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ABSTRACT

Eight papers from a one-day conference for lawyers, judges, and policy-makers discuss the effects on intergovernmental relations of the emerging body of laws, regulations, and court decisions governing federal grants and their recipients. The expanding importance of federal grants, notes an introduction to the papers, has meant both less leeway for state and local governments to turn down grants and many more court cases involving federal versus state sovereignty. Accompanied by comments and discussion, the first paper examines the current body of federal grant law and its legal and constitutional implications. Three further papers analyze government and private litigation over two large federal programs, the Community Development and Law Enforcement Assistance Administration block grants. A fourth paper gives tips and guidelines to state and local governments for arguing before the U.S. Supreme Court. To exemplify the legal, political, and fiscal implications of federal grant law, a paper in the form of a play presents a hypothetical case involving a city government and regulations regarding the disabled. Two final papers summarize the impact of federal grant law, through the judiciary, on intergovernmental relations and traditional federalism. (RW)

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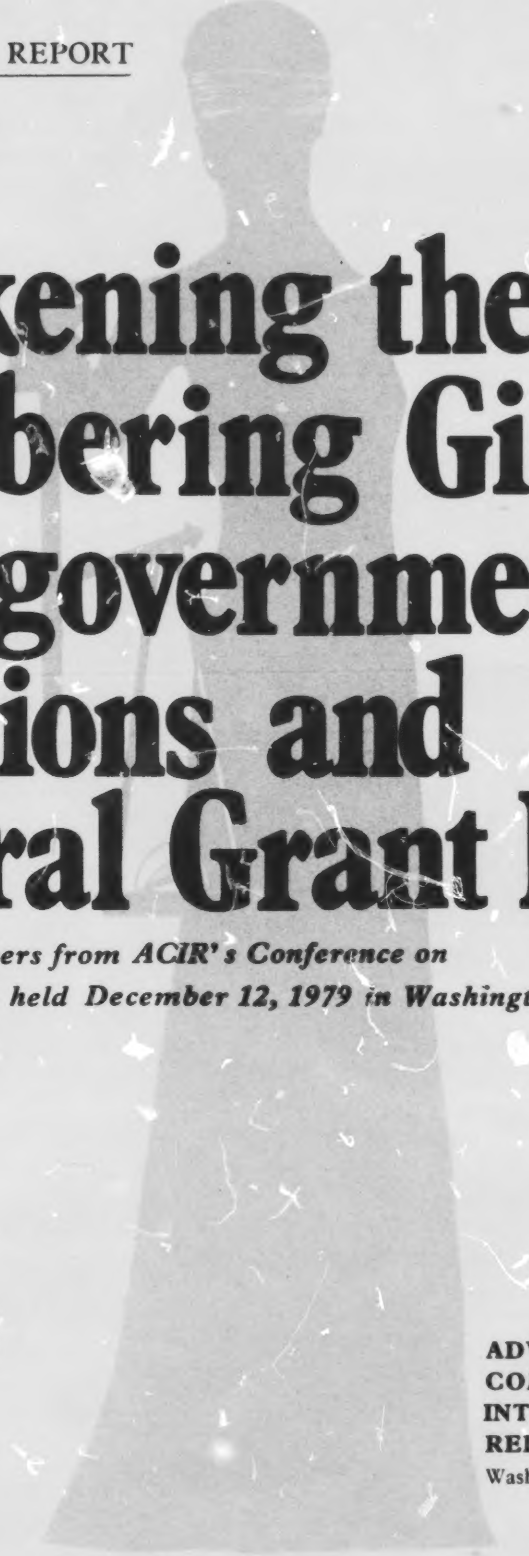
AN INFORMATION REPORT

Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law

A report of and papers from ACIR's Conference on Federal Grant Law, held December 12, 1979 in Washington, D.C.



**ADVISORY
COMMISSION ON
INTERGOVERNMENTAL
RELATIONS**
Washington, D.C. • December 1980

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AN INFORMATION REPORT

Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law

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Preface

In December 1979, the Advisory Commission on Intergovernmental Relations held a one-day conference on federal grant law. The purpose of the conference was to bring together both lawyers and nonlawyers to discuss the intergovernmental implications of the emerging field of grant law and to relate ACIR's extensive general experience on grants to the subject.

While the courts have traditionally played a key role in the workings of our federal system, their part in shaping the modern intergovernmental grant-in-aid system has generally been overlooked. Yet certain key legal precedents, as well as more recent decisions, have laid the ground rules which define the ways states and localities can receive, adapt, and benefit from federal grant programs. As the grant system has become bigger, broader and more intrusive, these decisions have become increasingly important—and sometimes unreasonable.

Can a state—or local government—afford to refuse a federal grant if it finds the rules and regulations accompanying that grant unreasonable? Should a state be required to make the uncomfortable choice between accepting federal money and losing local control when the grant and its concomitant conditions apparently infringe on the state's decisionmaking institutions and political processes? And, what about the requirements that apply across the board to all grants? Should a recipient really lose all federal dollars if it objects to implementing one such requirement? Or is there a limit to federal power?

The courts' answers to these and related questions are often based on precedents which seem outdated and simplistic in today's complex intergovernmental grant system. Perhaps the time has come to educate judges hearing these cases and lawyers trying them about the nature of the grant system and the interrelationship of the law to it. Similarly, policymakers and others interested in intergovernmental relations should be better informed of the same relationships and their options available under the current system.

In its conference—and this publication based on it—ACIR has made the first effort to bridge what can be termed a gap between the legal and policy worlds by discussing what makes up the law of federal grants and where is it headed. The overriding concern throughout was the impact of grant law on the intergovernmental system.

It was clear during the discussions of the day that while there was considerable variation in interpretations of various cases and implications of others, there was an apparent consensus that whatever it is that makes up the field of grant law is crucial to both the current and future operation of our intergovernmental system.

One judge has termed the emerging law of grants, the slumbering giant. With this conference, and this publication based on it, we at ACIR hope to do our part to awaken that giant.

Abraham D. Beame
Chairman

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Acknowledgements

ACIR is grateful to all those who helped make possible ACIR's conference on grant law and this volume based on it.

Special thanks go to those busy attorneys who assisted us in both planning and executing the session. Without their time, advice, and expertise, we might not have been able to tackle this important area. This special list includes George Brown, professor at Boston College Law School; Thomas Madden, former assistant administrator and general counsel, Law Enforcement Assistance Administration (LEAA); Malcolm S. Mason, former chairman, Departmental Grant Appeals Board, Department of Health, Education, and Welfare; Bill Montalto, assistant project director, Coordinating Committee on a Model Procurement Code, American Bar Association; William Rhyne, of Rhyne and Rhyne, Washington, DC; Steve Sorett, Office of General Counsel, Environmental Protection Agency; and Bob Wallick of Steptoe and Johnson, Washington, DC. John Settle, chairman, Board of Grant Appeals, Department of Health and Human Services, provided immeasurable assistance in working through, and executing the Section 504 play.

Also due special thanks are the other speakers who took the time and effort to share their expertise and opinions with the group. These include Charles Lauer, deputy general counsel, LEAA; Henry Monaghan, professor at Cornell Law School; Tom Moody, Mayor of Columbus, OH; and Charles Rhyne of Rhyne and Rhyne.

ACIR Assistant Directors Carl Stenberg and David Walker participated fully in planning and executing the conference as well as enlivening two key portions of the session.

Without Carol S. Weissert, ACIR's information officer, the conference would never have taken place. She sold ACIR on the idea of the conference, spearheaded both the planning and organizational efforts, and edited this volume.

Harolyn Adams and Elizabeth A. Bunn provided invaluable assistance in carrying out conference-related assignments and in preparing manuscripts for this volume.

Wayne F. Anderson
Executive Director

Carl W. Stenberg
Assistant Director

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Part I

ACIR's Grant Law Conference Whys and Wherefores

by Carol S. Weissert
Information Officer
ACIR

The growth and increased complexity of the intergovernmental grant system over the past several decades have been monitored and analyzed by many, including ACIR.

Not so well studied—especially by public policy analysts—is a related area which has a major impact on both the grant system and the intergovernmental network it overlays: litigation surrounding federal grants.

For, as the grant system has mushroomed, so has grant litigation. As Thomas Madden notes in his article in this publication, some 400 different cases dealing with grants have been decided in the last five years alone.

The type of litigation has changed as well. Public institutions and governments receiving or seeking federal aid have joined more "traditional" litigants, such as beneficiaries of federal aid programs and third parties seeking to block federally funded projects, going to the courts to seek redress for injury or to guarantee their "rights."

The intergovernmental dimensions of the growth and changed nature of grant litigation are significant. Grant-related cases throw into judicial laps major decisions and interpretations that many argue should be made by the Congress and state legislatures—not the courts. They further complicate an already complex and too often unworkable grant system. They change grantor-grantee relationships in ways probably neither wants. They slow-up implementation of programs and create myriad uncertainties which affect grant recipients and beneficiaries alike. And they can alter federal-state-local relations by strengthening the hand of Washington even in instances where such extra muscle can be said to significantly alter the traditional "balance of power" inherent in our federal system.

Further, and perhaps most troublesome, the decisions are often made using precedents which when applied years ago to a very different grant system might have been on the mark. However, in today's highly complex, markedly interdependent grant system, many seem outdated, simplistic, and wrong.

Federal grant law has, by and large, been left to the legal community, in spite of the fact that the decisions often have a direct impact on federal, state, and local policymakers receiving and administering federal grants. Judges hearing grant-related suits and lawyers trying them today frequently have little knowledge or interest in the workings of the federal system. Thus, some of the most far-reaching decisions are based on strict, narrow grounds with apparently little or no concern for their impact on the operation of our intergovernmental system.

In an attempt to bridge the gap between the legal and policy worlds, on December 12, 1979, the Advisory Commission on Intergovernmental Relations brought together attorneys and federal, state, and local policymakers to discuss federal grant law.

The conference—and this publication based on it—did not attempt to deal with all the many technical aspects related to grant law such as the kinds of remedies available to grantees or with all of the complicated legal concepts involved. Rather, ACIR's basic interest is the broader issue of the impact of this body of grant law on the intergovernmental system.

The legal precedents of grant law are longstanding—going back to land grant law—when Congress granted portions of the public domain to each state to be sold by them, with the proceeds used for the support of institutions of higher learning. In 1922 (when grants totaled only $118 million of which nearly 80% went to highways) a case was handed down which has had major impact on grant law. The case, *Massachusetts v. Mellon,*[1] established the notion that if a state did not wish to comply with specifications of a federal grant, it could simply refuse to accept the grant.

In spite of its superficial validity, the choice of "not yielding" to federal temptation is far too simple for today's grant system in which some states and even more localities may not be able to forgo funding supplied by a large federal program if it makes up a major portion of their budgets. Additionally, the imposition of requirements which apply across the board to all grants raises more questions about the appropriateness of the *Mellon* precedent. Does a recipient lose all federal dollars if it objects to implementing an across-the-board requirement? What if the requirement conflicts with the state constitution or structure in a way that clearly infringes on the state's decisionmaking institutions and political processes? Does federal supremacy apply in all instances?

In a 1978 case, *North Carolina v. Califano,*[2] the U.S. Supreme Court affirmed the opinion of a lower court upholding the Constitutionality of a federal law which the North Carolina Supreme Court ruled violated provisions of its state constitution. The lower court said "the validity of the power of the federal government under the Constitution to impose a condition on federal grants under a proper Constitutional power does not exist at the mercy of the state constitution or decisions of the state courts."

With this decision, the state was put in the unenviable position of having to change its constitution or lose all health-related federal funds coming into the state including Medicaid.

Lower court decisions upholding "conditions" were made in *Montgomery County, Maryland v. Califano*[3] regarding the ability of local governments to overrule decisions of local health services agencies; in *Macon v. Marshall,*[4] regarding employees' rights under grant programs; and in *Florida Department of Health v. Califano,*[5] on the Constitutionality of regulations that in effect barred reorganization of the state's health department—a pioneering effort that had been commended by social services' experts.

The only instance in recent years where the Court has recognized limits in federal power over the states was a 1976 Supreme Court case, *National League of Cities (NLC) v. Usery,*[6] and this involved the Commerce, not the Spending, Clause. The suit, brought by the NLC and a number of states, questioned the Constitutionality of amendments to the *Fair Labor Standards Act* applying federal minimum wage, maximum hour, and overtime rate standards to state and local employees. The Court held that the application of the act to the states and their political jurisdictions was unconstitutional on the grounds that the FLSA would significantly "impair the states' ability to function effectively within a federal system."

Since most cases in this area rely on the federal spending power—not the Commerce Clause—the decision has had limited impact on federal grant law.

To date, the Supreme Court has not specifically considered another key element of the modern grant-in-aid system—namely requirements placed on all grant programs to accomplish certain national policy goals such as civil rights, environmental protection, and citizen participation.

Other related—and still untested—questions, at the Supreme Court level at least, are: Can a federal law specifying that the executive, rather than the legislative branch of state government receive and spend federal grant money so intrude on state sovereignty that it violates the Tenth Amendment? Can a recipient refuse federal funding of a program it has participated in for several years when it doesn't want to implement certain new requirements of the program? Can an individual or group within a potential recipient jurisdiction force acceptance of a grant or grants on an alleged denial of a Constitutional right, when the jurisdiction by a majority referendum vote refused to participate? And, are, or should there be, fiscal limitations on the application of federal supremacy? To date, the courts have not yielded to the Tenth Amendment challenge, even in one lower court case recently upheld in the Court of Appeals *(County of Los Angeles v. Marshall)*[7] where assertions were made that compliance would result in virtual bankruptcy of some cities.*

Although the courts have stepped gingerly around possible federal coercion and have avoided using the NLC precedent in conditional spending cases, the sheer number of cases handed down—and the increasing complexity of those cases and the grants on which they are based—may well augur for an updating of some of the principles established when the intergovernmental system was less entangled, less costly, and more collaborative than it is today.

> **"In spite of its superficial validity, the choice of 'not yielding' to federal temptation is far too simple for today's grant system. . . ."**

Such an updating will require policymakers at all levels to more fully understand the implications of the law on the workings of the grant system. ACIR's conference—and this publication—may help lay the groundwork for increased understanding by considering such questions as:

- ☐ What makes up the body of federal grant law?
- ☐ Where does this law seem to be taking us?
- ☐ What are the implications of this law for our intergovernmental system?
- ☐ What is the status and what are the implications of recent litigation involving two major block grants—LEAA and Community Development?
- ☐ Are the legal options available to local officials who feel that crosscutting regulations are unreasonable and burdensome?

The opening session, a discussion of the law of federal grants and where it is headed, laid the Constitutional and legal background for the consideration of issues involving grants. Thomas J. Madden, former assistant administrator and general counsel of the Law Enforcement Assistance Administration (LEAA), made the initial presentation. Robert Wallick of Steptoe and Johnson and Malcolm S. Mason, former chairman, Departmental Grant Appeals Board, Department of Health, Education and Welfare, responded to Madden's presentation.

The importance of litigation in two areas—community development and law enforcement—was the subject of the second panel session made up of Tom Moody, Mayor of Columbus, Ohio; George Brown, professor at Boston College Law School; and Charles Lauer, LEAA deputy general counsel.

Charles S. Rhyne of Rhyne and Rhyne, Washing-

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*Still another erosion of the Tenth Amendment argument took place in a 1980 case, *Maine v. Thriboutot,* where the Supreme Court extended civil rights guaranteed under the 1871 civil rights law (commonly known as Section 1983) to a variety of federal-state programs. The ruling also provided that the states are liable for attorney's fees of plaintiffs who are successful in court. In a dissenting opinion, Justice Lewis F. Powell, Jr., called the decision "a major new intrusion into state sovereignty" and cited at least 30 federal-state statutes that could be the basis of damage claims against states.

ton, DC, who has represented states and localities in a number of cases before the Supreme Court including *Baker v. Carr* and *NLC v. Usery,* described his views of the Supreme Court and federalism at the luncheon session.

The legal, political, and fiscal implications of federal regulatory actions on state and local governments were illustrated with a dramatization entitled "Anatomy of a Grant Controversy: Handicapped Regulations and City Hall" dealing with implementation of regulations surrounding Section 504, providing equal rights for the handicapped. Actors and co-authors of this play were William Montalto, assistant project director, Coordinating Committee on a Model Procurement Code, American Bar Association; William Rhyne, Rhyne and Rhyne; Stephen Sorett, Office of the General Counsel, Environmental Protection Agency; John Settle, chairman, Board of Grant Appeals, Department of Health and Human Services; Carl W. Stenberg, assistant director, ACIR; and Carol S. Weissert, information officer, ACIR.

And, finally, as a way of recapitulating some of the discussions of the day, Henry Monaghan, Robert S. Stevens professor at Cornell Law School, and David B. Walker, assistant director of ACIR, debated the current impact of the judiciary on intergovernmental relations and what it might be in future years.

The volume contains papers presented by these participants and much of the discussion that followed their presentations.

FOOTNOTES

[1] 262 U.S. 447 (1923).

[2] 445 F. Supp. 532 (E.D.N.C. 1977) aff'd mem., 435 U.S. 962 (1978).

[3] 449 F. Supp. 1230 (D. Md. 1978).

[4] 439 F. Supp. 1209 (M.D. Ga. 1977).

[5] 449 F. Supp. 274 (N.D. Fla. 1978), aff'd 585 F. 2d 150 (5th Cir. 1978).

[6] 426 U.S. 833 (1976).

[7] —F2nd—DC Cir. March 20, 1980, pet. for cert. pend. no. 79-1965 (filed June 14, 1980).

Part II

The Law of Federal Grants

by Thomas J. Madden
Assistant Administrator/General Counsel
Law Enforcement Assistance Administration*

Although federal grant instruments are in many cases exceedingly complex documents and although there are hundreds upon hundreds of terms and conditions that govern the expenditure of grant funds, there has been only a limited development of a uniform body of grant law and much of that development has come in recent years.[1] In numerous federal court decisions, the courts have treated grant issues as novel issues even though the issues have already been decided by other federal courts.

An important factor that has limited the development of a uniform grant law has been the volume and scope of grants. Prior to the early 1960s, there were only a relatively small number of grant programs and consequently only a small number of lawsuits involving grants.[2] After 1960, the rapid increase in the number of grant programs and the amount of funds available for grants satisfied grantees' programmatic and economic needs and limited the need to resort to legal action.[3]

Recently, as state and local governments have been pressed for financial resources, as politically unpopular grant programs have been pared down or denied what before had been their annual increase in funds, and as the total amount of funds available for grants has leveled off in real dollar terms[4], a number of lawsuits have been brought to challenge denial of grants or to challenge regulations which limit eligibility for grants.

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*In July 1980, Thomas J. Madden resigned as LEAA Assistant Administrator/General Counsel and joined the Washington, DC, law firm of Kaye, Scholar, Fierman, Hays, and Handler where he is involved in grants law practice.

The expansion of procedural and substantive due process concepts in the administrative law area and the willingness of the Federal Court of Appeals for the District of Columbia to apply a standard of reasonableness to actions of federal administrative agencies have also led to more litigation in the grants area[5].

In addition, there are now over 20 laws which impose national policies on grants and establish terms and conditions that all recipients of grant funds must follow.[6] The vast majority of these laws, which include Title VI of the *Civil Rights Act of 1964,*[7] and the *National Environmental Policy Act,*[8] have been enacted since 1964. These laws have given rise to numerous lawsuits brought by third parties who have been denied assistance under a grant, who have been denied the benefits of the grant, or who have been adversely affected by a grant.[9]

Much of the development in the law of grants has come since 1975. A survey of federal court cases by the LEAA Office of General Counsel identified almost 500 different cases which deal with grants. Eighty percent have been decided since 1975.

This paper examines some of the key Constitutional and legal precepts that have emerged from the federal courts' consideration of matters involving grants and that are at the foundation of the developing body of grant law.

CONSTITUTIONAL FOUNDATION OF GRANTS

The authority of the federal government to act is defined by the Constitution and a consideration of federal grant law must start with the Constitution.

Congress under Article I, Section VIII, Clause 1 of the Constitution is authorized "To lay and collect taxes . . . and provide . . . for the general welfare of the United States."

In cases such as *Massachusetts v. Mellon,*[10] in 1923, *United States v. Butler,*[11] in 1936, *Steward Machine Company v. Davis,*[12] in 1937, and *Oklahoma v. Civil Service Commission,*[13] in 1947, the Supreme Court recognized that Congress has the authority under this clause of the Constitution to provide financial assistance to state and local governments "to promote the general welfare," and this is the basic Constitutional authority for most grant programs.

The Supreme Court has held that the power of Congress to provide for the general welfare through financial assistance is not limited to carrying out the other powers of Congress specifically enumerated in the Constitution but must be construed to allow the Congress to create any financial assistance program which furthers the general welfare, provided that the exercise of power does not violate some other provision of the Constitution such as the First, Fifth, or Fourteenth Amendment.[14] The Supreme Court has also held that the determination of what furthers the general welfare of the nation is uniquely a Congressional function.[15]

Congress also is authorized under Article IV, Section 3, Clause 2, to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. It is under this authority that Congress has made land grants to the states.

However, nowhere in the Constitution is there a reference to grants, and the actual authority to use grants to provide financial assistance to further the general welfare or to dispose of land by means of grants is founded on the "inherent" power of the Congress under the "Necessary and Proper Clause" of the Constitution. There is no reference to contracts or cooperative agreements in the Constitution and the authority of the government to use these instruments is likewise founded on the Necessary and Proper Clause.

The Necessary and Proper Clause is found in Article I, Section VIII, Clause 18 of the Constitution. It follows the enumeration of specific Congressional powers including the taxing and spending powers and authorizes Congress:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof.

The limits of the Necessary and Proper Clause were first defined by Justice Marshall in *McCulloch v. Maryland,*[16] where the Supreme Court stated:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to end, which are not pro-

> hibited, but consistent with the letter and spirit of the Constitution, are Constitutional.[17]

The Constitution likewise contains no express provision which authorizes the federal government to enter into agreements with states. Yet the Supreme Court as early as 1866 in *McGee* v. *Mathias*,[18] asserted that a grant from the federal government to a state constituted a contract.[19]

DUAL FEDERALISM AND THE IMPACT OF GRANTS-IN-AID ON THE RESERVED POWERS OF THE STATES

The Tenth Amendment of the Constitution is an expression of the unique federation embodied in the United States Constitution.[20] The amendment recognizes that certain powers of government are vested in the federal government and certain powers of government are reserved to the states. This principle is commonly referred to as "dual federalism" and has important significance for an understanding of the limits of federal grants-in-aid.

In *McCulloch v. Maryland*,[21] the case quoted earlier, Justice Marshall held that the Tenth Amendment does not prohibit the federal government from taking action which interferes with the reserved powers of the states if the action was proper and was within the expressed or implied powers of the Congress.

During the Taney era, the holding in *McCulloch* was narrowed as the Supreme Court fashioned out of dual federalism the concept of "equal sovereignty." Under this concept the state governments and the federal government were considered independent and equal within their own spheres of authority. This concept resulted in the 1871 Supreme Court decision in *Collector v. Day*,[22] for example, holding that the states in the exercise of their reserved powers are independent of regulation by the Congress and that the federal government therefore could not impose a tax on the salaries of state employees.

This narrow view of dual federalism was still prevalent in 1918 when in *Hammer v. Dagenhart*[23] the Supreme Court held that a child labor law which prohibited the transportation of child-made goods in interstate commerce was not a regulation of "commerce among the states," but an invasion of the reserved powers of the states.

One of the most succinct statements of the Supreme Court on dual federalism was made in *United States v. Butler*,[24] when the narrower view of dual federalism was beginning to change. The Court there stated that:

> The question is not what power the federal government ought to have, but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments—the state and the United States. Each state has all governmental powers save such as the people, by their Constitutions, have conferred upon the United States, denied to the states, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.[25]

The authority of Congress to make grants to states to carry out programs that required the exercise of the states' reserved powers was first put before the Supreme Court in 1922. In the cases of *Massachusetts v. Mellon* and *Frothingham v. Mellon*,[26] the Supreme Court considered a challenge to the Constitutionality of a formula grant-in-aid program created by the *Maternity Act*.[27]

The Court described the *Maternity Act* as follows:

> Briefly, it provides for an initial appropriation and thereafter annual appropriations for a period of five years, to be apportioned among such of the several states as shall accept and comply with its provisions, for the purpose of cooperating with them to reduce maternal and infant mortality and protect the health of mothers and infants. It creates a bureau to administer the act in cooperation with state agencies, which are required to make such reports concerning their operations and expenditures as may be prescribed by the federal bureau. Whenever that bureau shall determine

> that funds have not been properly expended in respect of any state, payments may be withheld.

In the *Massachusetts* case the challenge was brought by the State of Massachusetts in an original action in the Supreme Court.

The Court described Massachusetts contentions as follows:

> In the *Massachusetts* case it is alleged that the plaintiff's rights and powers as a sovereign state and the rights of its citizens have been invaded and usurped by these expenditures and acts; and that, although the state has not accepted the act, its Constitutional rights are infringed by the passage thereof and the imposition upon the state of an illegal and unconstitutional option either to yield to the federal government a part of its reserved rights or lose the share which it would otherwise be entitled to receive of the moneys appropriated.[28]

The Court dismissed Massachusetts' complaint and provided the following rationale:

> Probably, it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject.[29]

The Supreme Court went on to hold as follows:

> What, then, is the nature of the right of the state here asserted and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the states. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the states to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several states; and that there is imposed upon the states an illegal and unconstitutional option either to yield to the federal government a part of their reserved rights or lose their share of the moneys appropriated. But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the states where they reside. Nor does the statute require the states to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.
>
> In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that the question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.[30]

In the *Butler* case the Supreme Court considered the nature of the Congress's power under the taxing and spending power. At issue in *Butler* was the *Agricultural Adjustment Act*, which was designed to increase the prices of certain farm products by decreasing the quantities produced. The decrease was obtained by making payments of money to farmers who, under contracts with the federal government, reduced their acreage and crops. The money for the payments was obtained by a tax imposed on those who first purchased and processed the farm products.

The Supreme Court held in *Butler* that the tax imposed by the *Agricultural Adjustment Act* was an improper attempt to regulate the production of farm goods, which was a matter reserved to the states under the Constitution.

In reaching this conclusion the Supreme Court made a number of findings that relate to grants-in-aid. The Court specifically recognized that public funds may be appropriated by the Congress "to provide for the general welfare of the United States," under Article I, section 8 of the Constitution, and that the power to appropriate for the general welfare is not limited to the purposes set out in the other enumerated powers of the Congress found in the Constitution.[31]

The Supreme Court also held that where the exercise of the taxing and spending power is proper the federal action has supremacy over state action.[32]

The Supreme Court also distinguished its holding in *Massachusetts v. Mellon* on grants-in-aid and also recognized that the authority of Congress under the taxing and spending power is limited by other provisions of the Constitution which circumscribe the bounds of Congressional authority.[33]

To Professor Edwin Corwin, the critical difference between *Butler* and *Mellon* was that:

> The decision turned on the proposition that the proposed beneficiaries of federal largess were not free to reject it on account of the sharp competitive relation in which they stood to each other. Clearly this line of reasoning in no wise disturbs the statement in the *Mellon* case, with reference to a statute not to be differentiated in this respect from any grant-in-aid, that it did "not require the states to do or yield anything."[34]

Within a year after *Butler* was decided, Roosevelt attempted to "pack" the Supreme Court with justices who were more tolerant of his views. This brought about a dramatic change in the manner in which the Supreme Court viewed the reserved powers of the states and the taxing and spending power.

In 1937, *Butler* was limited by the Supreme Court's decision in *Steward Machine Co. v. Davis.*[35] In this case the Supreme Court upheld the Constitutionality of the *Social Security Act.* The Court specifically upheld one title of the act which imposed a tax on employers to be used for unemployment benefits and in turn provided for the states to receive these funds if the states agreed to use the funds to provide payments to unemployed. The Court also sustained a title of the act which authorized the federal government to make grants to states to enable them to administer the unemployment programs.

The Court rejected arguments that the *Social Security Act* was coercive and a usurpation of the states' reserved powers. The Court stated that:

> It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.[36]

The Court also held that the *Social Security Act* represented a legitimate attempt to solve the unemployment problem by a cooperative agreement between the federal and state governments.

The *Social Security Act* cases [37] marked a beginning of the Supreme Court's return to Marshall's views in *McCulloch v. Maryland.*[38] In 1939, *Collector v. Day*[39] was expressly overruled in *Graves v. New York.*[40] By 1941, the Court's return was complete when in *United States v. Darby*[41] the Court made the following statement about the Tenth Amendment:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers . . . .
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.[42]

The Supreme Court next took up the question of grants-in-aid and states' reserved powers in *Oklahoma v. Civil Service Commission.*[43] The specific issue was whether the Congress could impose a condition on a grant-in-aid which limited the political activities of state officials.

The condition in question arose out of the *Hatch Act.* The *Hatch Act* at that time provided that no state or local government official could participate in partisan political activities if his or her salary were paid in whole or in part with funds derived from grants-in-aid. Exceptions were made for elected officials.

The Supreme Court found that while Congress had no power to regulate the political activities of state officials it did have the power to fix the terms under which appropriated funds could be spent. The Court rejected Oklahoma's contention that the *Hatch Act* violated the Tenth Amendment by authorizing the Civil Service Commission to withhold grant funds allocated to the state when the state failed to comply with the *Hatch Act*.

The Court rejected this contention as follows:

> While the United States is not concerned with, and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.
>
> The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. As pointed out in *United States v. Darby,* 312 U.S. 100, 124, the Tenth Amendment has been consistently construed "as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." The end sought by Congress through the *Hatch Act* is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid.[44]

Under the *Hatch Act,* Oklahoma had the choice of removing the official who participated in the prohibited political activities or forfeiting twice his annual salary in grant funds. The Court found no violation of state sovereignty since Oklahoma "adopted the 'simple expedient' of not yielding to what she feels is federal coercion."[45] The Court cited ***Massachusetts v. Mellon***[46] to support this point.

The Tenth Amendment question is still alive with respect to grants and the possibility exists that the Supreme Court may find that a grant-in-aid program crosses the line from inducement to coercion. There is language in both the ***Butler*** and the ***Oklahoma*** cases that admits to this possibility.[47] Furthermore, the Supreme Court's decision in 1976 in *National League of Cities v. Usery*[48] was a definite retreat from *Steward Machine Company* and the *Darby* cases and has led to a new round of litigation on the application of the Tenth Amendment to grants-in-aid.[49]

"The Tenth Amendment question is still alive with respect to grants and the possibility exists that the Supreme Court may find that a grant-in-aid program crosses the line from inducement to coercion."

In the *League of Cities* case numerous states and the National League of Cities, a nonprofit organization which represents in Washington the interests of many of the nation's cities, challenged 1974 amendments to the *Fair Labor Standards Act* (FLSA).[50] These amendments extended the act's minimum wage and maximum hour provisions to most state and local government employees.

The FLSA, which was originally enacted in 1938, was passed by Congress under its power to regulate interstate commerce.[51] The FLSA was originally found to be a valid exercise of Congressional power in the *Darby* case and not to be an invasion of the states' reserved powers. However, the FLSA did not apply to state and local government employees at that time.

The National League of Cities argued that the 1974 amendments severely limited the states' ability to structure employer-employee relationships in areas of government reserved to the states such as fire prevention, police protection and public health services. This, the League urged, was not within the power of Congress under the Commerce Clause. The Supreme Court agreed.

The Supreme Court opened its consideration of the case by noting that:

> In *Fry, supra,* the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:
>
> While the Tenth Amendment has been characterized as a "truism," stating merely that 'all is retained which has not been

surrendered,' *United States v. Darby,* 312 U.S. 100, 124 (1941), it is not without significance. The amendment expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the states' integrity or their ability to function effectively in a federal system.[52]

The Court continued this line of reasoning and then concluded its discussion as follows:

> If Congress may withdraw from the states the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the states' "separate and independent existence." *Coyle,* 221 U.S. at 580. Thus, even if appellants may have overestimated the effect which the act will have upon their current levels and patterns of governmental activity, the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the states in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the states' "ability to function effectively in a federal system," *Fry,* 421 U.S. at 547 n.17. This exercise of Congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, §8, cl. 3.[53]

The Court limited its holding to the powers of Congress under the Commerce Clause and in a footnote expressly stated that its opinion did not extend to grants. In the footnote the Court stated that:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power. Art. I, §8, cl. 1 or §5 of the Fourteenth Amendment.[54]

A number of commentators have speculated upon the potential impact of *League of Cities* on grants and some of these commentators have felt that *League of Cities* portended significant problems for the federal government in carrying out the grant-in-aid program.[55]

The Supreme Court did hold in *League of Cities* that the Tenth Amendment places an affirmative limitation on the powers of Congress. Earlier discussion has shown that the Congress is constrained by the affirmative limitations of the Constitution in carrying out the taxing and spending power.[56] Thus, by analogy *League of Cities* stands for the principle that the Tenth Amendment places an affirmative limitation on the powers of Congress under the taxing and spending clause.

It is unclear what those limitations are and a little more than a year after the *League of Cities* case was handed down, the Supreme Court summarily affirmed the decision by the District Court for the Eastern District of North Carolina in *North Carolina v. Califano,*[57] which held that the imposition of a grant condition requiring the state to amend its constitution as a condition of receiving certain grants did not violate the Tenth Amendment.

In this case, the State of North Carolina brought a lawsuit against the Secretary of Health, Education and Welfare challenging the Constitutionality of the *National Health Planning and Resources Development Act of 1974.*[58] This act was passed by the Congress "to facilitate the development of recommendations for national health planning policy, to augment areawide and state planning for health service, manpower and facilities, and to authorize financial assistance for the development of resources to further that policy."[59] The act authorizes the Secretary of HEW to make grants to states to establish state health planning and development agencies, state health coordinating councils, and health services agencies at the local level. The act establishes numerous requirements for receipt of assistance designed to improve the quality of health services and to control the costs of health services.

At issue in the *North Carolina* case was the requirement in the *National Health Planning Act* that the state establish a certification of need program. Under this program the state, as a condition for receiving funds, was required to agree to regulate the building of new public and private health facilities and the provision of public and private health services to assure that only those services and facilities found to be needed would be offered or developed in the state.

If a state fails to negotiate an acceptable agreement with HEW by July 1980, the Secretary of HEW must withdraw funding under the *National Health Planning Act* as well as "other" federal health programs, including Medicaid, the largest of all grant programs, until such agreement becomes effective.

The State of North Carolina argued that the act crossed the line from inducement to coercion and was a violation of the Tenth Amendment and the Supreme Court's decision in the *Steward Machine Company* case.[60] The state argued that the requirements to regulate private institutions violated the state constitution and that by proposing the sanction of withdrawal of Medicaid and other health care funds the state was placed in the untenable position of having to amend its constitution or forgo substantial federal funding for health care. The Court on this point stated:

> The plaintiff, North Carolina, would . . . find the condition coercive under the unique circumstances applicable to it. This situation arises because the Supreme Court of North Carolina, by declaring that the Constitution of North Carolina, as it presently exists, proscribes the creation and operation of a state certificate of need mechanism. As a result of that ruling North Carolina is threatened with a future loss of federal aid under some 42 federal health assistance programs, a loss which can only be avoided by a constitutional amendment. When a legislative condition operates that drastically upon a state, the plaintiff contends, it becomes "coercive," and not simply inducement . . . . Simply because one state, by some oddity of its constitution may be prohibited from compliance is not sufficient ground, though, to invalidate a condition which is legitimately related to a national interest sought to be achieved by a federal appropriation and which does not operate adversely to the rights of the other states to comply. Were this not so, any state, dissatisfied by some valid federal condition on a federal grant could thwart the Congressional purpose by the expedient of amending its constitution or by securing a decision of its own supreme court. The validity of the power of the federal government under the Constitution to impose a condition on federal grants made under a proper Constitutional power does not exist at the mercy of the state constitution or decisions of state courts.[61]

The Tenth Amendment limits have also been considered by other federal courts after *League of Cities* and all have upheld the challenged grant laws.

In the case of *Montgomery County, Maryland v. Califano,*[62] the District Court for the District of Maryland considered a challenge by Montgomery County to the Constitutionality of another provision of the *National Health Planning Act.* This decision was rendered before the Supreme Court decision in the *North Carolina v. Califano* case. The issue in this case was a provision that allowed the local health services agencies to make decisions which could not be overruled by the local county governments. The court found there was no provision in the *National League of Cities* case which could be construed as limiting the authority of the Congress to establish the grant program of the *National Health Planning Act* with its inducements and sanctions.[63] The court stated that:

> The act imposes no civil or criminal penalties on such states or their officials. While the withholding of federal funds in some instances may resemble the imposition of civil or criminal penalties and while economic pressure may threaten such havoc to a state's well-being as to cause the federal legislation to cross the line which divides inducement from coercion, that line is not crossed in this case. Nor does the act displace local initiative with federal directives. The act mandates essentially a cooperative venture among the federal government and state and local authorities.[64]

In a second case, *Macon v. Marshall,*[65] also decided before *North Carolina,* the district court found that Macon was required to comply with federal regulations governing employees' rights, in-

“The Tenth Amendment limits have also been considered by other federal courts after the *League of Cities* and all have upheld the challenged grant laws.”

cluding local public employees' rights under federal grant programs even though under the *National League of Cities* case such regulations would be unconstitutional as issued. In furtherance of Congress's power to regulate commerce under the Commerce Clause, the court discussed *National League of Cities* as follows:

> Unlike the amendment to the minimum wage laws which included states and political subdivisions as employers under the minimum wage laws and thereby required state and political subdivisions to pay their employees a Congressionally determined minimum wage and comply with the many other federal requirements, the *Urban Mass Transportation Act* does not directly require or command anything of states or their political subdivisions. Neither states nor political subdivisions are compelled to participate in the grand federal scheme created by the act and thereby receive federal money. The participation is purely at their option. It is because of this that Macon is not now participating—it has elected not to.[66]

In a third case, *Florida Department of Health v. Califano,*[67] the State of Florida brought an action against the Secretary of Health, Education and Welfare challenging the Constitutionality of regulations issued by the Secretary of HEW under the *Rehabilitation Act.*[68] This act authorizes grants to states in meeting the cost of services to the handicapped. As a condition of receipt of the funds, the state must designate state agencies to administer the funds. The state agency must meet certain minimum statutory and regulatory requirements.

The state asserted that the *Rehabilitation Act,* to the extent that it conditions grant funds on the adoption by the state of particular governmental structure, violated the Tenth Amendment. The state relied almost exclusively on the Supreme Court ruling in *National League of Cities.* The court rejected the state's reading of *National League of Cities* and concluded that the case was one “where the federal intrusion is wholly indirect and limited to measures meant to insure the proper functioning of federally funded programs.”[69] The Court further stated:

> Congress, through the *Rehabilitation Act,* has extended substantial grants-in-aid to the states as an inducement for their participating in a shared program providing vocational rehabilitation services to the handicapped. This inducement carries with it certain conditions Congress deems essential to the functioning of the program; however, any state which objects to the “strings” attached to receipt of the federal funds has the option to refuse both the grants-in-aid and the objectionable conditions. The act does not impose a set of coercive, mandatory requirements such as were involved in *National League of Cities.*[70]

In affirming the district court's decision in *North Carolina v. Califano,* the Supreme Court served notice that it was not inclined to test the theoretical or practical limitations that the Tenth Amendment places on the Congress's power under the taxing and spending clause to induce state action in furtherance of the general welfare of the nation. The lower federal courts showed a similar reluctance after *League of Cities* and before the *North Carolina* case.

In a short span of years, we have moved far beyond the handful of grant programs that existed when the Supreme Court examined the case of *Massachusetts v. Mellon* or even when it considered the *Steward Machine Company* case.

Grant-in-aid programs affect each and every aspect of state and local government, reaching into the executive, legislative, and judicial branches. The *Health Planning Act* intrudes upon state and local operations to a greater degree than almost any other grant program. It virtually mandates the passage of legislation by state or local governments. The consequences of a state's action not to comport with the *Health Planning Act* go far beyond simple termination of assistance under one program but go to all health programs within a state. Withdrawal of federal funds for failure to comply with the *Health Planning Act* would cripple a state's efforts to maintain health care assistance for citizens of that state, and yet the Supreme Court summarily upheld the authority of Congress under the taxing and spending powers to impose such limitation on expenditure of federal funds without violating the Tenth Amendment.

It may be that the use of grant programs as an instrument of national policy has become too pervasive and too widespread for an argument to be made that any exercise of the Congress's power under the taxing and spending power, short of virtual federal usurption of state power by the Congress, would be overturned by the Supreme Court under the Tenth Amendment.[71]

THE LIMITS OF CONGRESSIONAL AUTHORITY TO ESTABLISH GRANT PROGRAMS

The authority of Congress to establish grants-in-aid under the taxing and spending power as noted earlier cannot be exercised in violation of the affirmative limitations placed by the Constitution on Congressional powers.

In *Shapiro v. Thompson*[72] in 1969 for example, the Supreme Court considered provisions of the Aid to Families with Dependent Children (AFDC) grant-in-aid programs which limited eligibility for AFDC welfare benefits to individuals who lived in a state for one year.

The Court held that the *Social Security Act* which established the AFDC program could not be read to support the one-year limitation since the one-year limitation violated the Equal Protection Clause of the Fourteenth Amendment. The Court stated that:

> Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes states to violate the Equal Protection Clause.[73]

In *Tilden v. Richardson,*[74] the Supreme Court considered a challenge to the authority of Congress to authorize grants for the building of facilities at church-affiliated colleges and universities. In *Tilden* the Court held that provisions of Title I of the *Higher Education Facilities Act of 1963* violated the First Amendment by authorizing the church-affiliated schools to use the facilities, constructed with grants, for religious purposes 20 years after their initial construction. The Court did hold that grants could be used to build the facilities as long as the primary effect of the grant was not to advance or inhibit religion.

A number of federal courts recently heard a series of challenges to the Constitutionality of the *Local Public Works Capital Development and Investment Act of 1976,* as amended by the *Public Works Employment* (PWE) *Act of 1977.*[75]

The PWE Act established a public works grant program to be administered by the Secretary of Commerce through the Economic Development Administration. At issue in these cases was a provision in the PWE Act that prohibited the Secretary of Commerce from making grants to local governments unless they provided assurances that at least 10% of the amount of each grant be expended for minority business enterprises (MBE).[76]

The lawsuits were brought by state associations of general contractors representing their memberships' interest and by nonminority contractors against the Secretary of Commerce. The specific question presented in these cases was whether the MBE provision violated the plaintiffs' right to due process of law by creating a classification which provided for the granting of federal assistance solely on the basis of race.

The three courts of appeals that considered the issues all upheld the Constitutionality of the MBE provision. In *Fullilove v. Kreps,*[77] for example, the second circuit noted in 1978 that: "When Congress seeks to exercise its spending powers, it is required to distribute federal funds in a manner that neither violates the equal protection rights of any group nor continues the effects of violations that have occurred in the past."[78]

In *Fullilove,* the court found that Congress in enacting the MBE provision provided a set aside of funds to benefit minority contractors and that the purpose of this benefit was to enact a remedy for past discrimination.

The court then noted that the government's interest in overcoming past discrimination is sufficiently compelling to allow the use of racial preferences.

Fullilove was appealed to the Supreme Court where in the decision of *Fullilove v. Klutznick,*[79] the Supreme Court ruled that Congress may require recipients of grants to use 10% of the grant funds as provided by the MBE provision to procure supplies and services from businesses owned and controlled by members of statutorily identified minority groups. Justice Burger, who issued the Court's majority opinion, found that Congress under the spending power can further national policy objectives by conditioning receipt of federal money upon compliance by the recipient with federal statutory directives. In upholding the MBE provision, Justice Burger cited the Supreme Court's decision in the *Steward Machine Company* case.[80]

EFFECT OF THE SUPREMACY CLAUSE

The "Supremacy Clause" of the Constitution[87] has been interpreted by the Supreme Court to provide that when Congress passes laws pursuant to its Constitutional powers, conflicting state law and policy must yield.

In *King* v. *Smith*[83] the Supreme Court in 1968 considered regulations issued by the State of Alabama to expend funds received by Alabama through grants-in-aid. The grants-in-aid were made under the *Social Security Act* for the AFDC program.

The Supreme Court noted that "the AFDC program is based on a scheme of cooperative federalism."[84] States, the Court observed, are not required to participate but those that do participate are required to submit a plan which conforms with the requirements of the *Social Security Act* and with HEW rules. The plan must be approved by the Secretary of HEW.[85]

The Supreme Court held that the Alabama regulations which were incorporated in the plan submitted to HEW were invalid because they conflicted with the HEW rules. In an oblique reference to the Supremacy Clause the Court asserted that:

> There is of course no question that the federal government, unless barred by some controlling Constitutional prohibitions, may impose the terms and conditions upon which its money allotments to the states shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.[86]

In 1971, in *Townsend* v. *Swank*,[87] the Supreme Court expressly held that a state law which was inconsistent with the AFDC regulations was invalid under the Supremacy Clause.[88]

THE LEGAL RELATIONSHIP CREATED BY GRANTS

Although courts once labeled grants as gifts and trusts, the most consistent view is that modern grants establish a contractual relationship between the federal grantor and the grantee who accepts the federal grant.

Where the grantee is a private party and the grant is being given to support the activities of a grantee who promises to use the money to further a national objective, it is easy to define and identify the elements of a contract.

When the grantee is a state or unit of local government, questions of federalism overlay the relationship and enter into the legal equation. Principles like "caveat emptor" seem particularly inappropriate on the one hand. On the other hand, however, there are two distinct parties to the grant. There is an offer of a grant by the federal government and an acceptance by the state or local government. There is a mutual exchange of promises evidenced in writing.

An early case which considered the legal nature of federal grants was *McGee v. Mathias*.[89] At issue was an 1850 act which granted to the states all the swamp and overflowed land in the state then belonging to the federal government. The grants were made on the condition that the proceeds for sale of some of the lands be applied, as far as necessary, to the reclaiming of the lands for cultivation.

The grants at issue in *McGee v. Mathias* were made to Arkansas and accepted for the state by the legislature.

In *McGee* the Court stated:

> It is not doubted that the grant by the United States to the state upon conditions, and the acceptance of the grant by the state, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject matter, sufficient consideration, and consent of minds. This contract was binding upon the state and could not be violated by its legislation without infringement of the Constitution.[90]

The Supreme Court and the lower federal courts have consistently treated monetary grants as creating a contractual arrangement. Corwin in his book on the Constitution concludes that grants-in-

“A federal grant is of course not a federal contract as the term is commonly understood.”

aid create a quasi-contractual relationship between the national government and the states because:

> In entering upon a compact to which Congress has given its consent a state accepts obligations of a legal character which the Court and/or Congress possess ample powers to enforce. Nor will it avail a state to endeavor to read itself out of its obligations by pleading that it has no constitutional power to enter upon such an arrangement and has none to fulfill its duties thereunder.[91]

20 Some of the more recent pronouncements of the Supreme Court which have also emphasized the contractual obligations created by grants include one of the leading civil rights cases, *Lau v. Nichols,*[92] decided in 1974. In *Lau* the Supreme Court found that the San Francisco school district in accepting education grants from the Department of Health, Education and Welfare “contractually agreed to ‘comply with Title VI of the *Civil Rights Act of 1964* . . . and all requirements imposed by or pursuant to that Title . . . ’ and also immediately to ‘take any measures necessary to effectuate this agreement’.”[93]

In 1977, in a case involving grants by the Federal Aviation Administration under the *Airport and Airway Development Act of 1970,*[94] the Supreme Court made numerous references to the “contract” between the FAA and its grantee, De Kalb County, GA.[95] The Supreme Court stated at one point that:

> The operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude. However, we see no reason for concluding that these operations would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts.[96]

Lau and *Miree* are part of a larger body of important federal case law in which the courts have relied on the contract analogy to allow the federal government and third parties to enforce the terms of grants in furtherance of the national policies established by grants.[97]

A federal grant is of course not a federal contract as the term is commonly understood. It is one entered into under laws specifically authorizing the federal government to enter into contracts. Federal grants are governed by different policies, laws, regulations, and procedures than federal procurement contracts.

The differences between grants and contracts were made even clearer in 1978 with the passage of the *Federal Grant and Cooperative Agreement Act.*[98] This act provides a single generic source of authority for all federal agencies to award grants, cooperative agreements and contracts. It does not repeal or replace existing authority to make grants but provides authority to agencies to use either a grant, cooperative agreement, or contract as the appropriate instrument for defining the relationship between the federal government and the party with which the federal government is dealing.

THE APPLICATION OF PRINCIPLES OF ADMINISTRATIVE LAW TO GRANTS

The federal agencies involved in awarding and administering grants and in enforcing the terms and conditions of grants are, of course, administrative agencies and are governed by that body of legal principles which has come to be known as administrative law.[99]

The Administrative Procedures Act[100] is the mainspring of federal administrative law and provides the basic legal framework which governs the activities of federal agencies.[101] The act establishes procedures for agency rulemaking, agency adjudication, and judicial review of federal administrative agencies’ actions.

Agency rulemaking is generally governed by 5 U.S.C. §553.[102] This section sets forth procedures an agency must follow in issuing regulations governing actions taken by the agency. Under 5 U.S.C. §553, a general notice of proposed rulemaking must be published in the *Federal Register.* The notice must contain the terms and substance of the proposed rule or a description of the subject and issues involved. The required publication must ordinarily be made not less than 30 days before the effective date.

After notice, the agency must give persons an opportunity to participate in the rulemaking through submission of written data, views or arguments, with or without an opportunity for oral presentation. Following review of the comments, the agency can issue final regulations. Although by its express terms Section 553 does not have to be followed by agencies in issuing regulations relating to grants, most major federal grantor agencies have formally adopted the procedures of Section 553 and apply them to all regulations governing grants.[103]

In *National Welfare Rights Organization v. Mathews,*[104] the Court of Appeals for the District of Columbia circuit held that regulations issued by the Department of Health, Education and Welfare to govern expenditures under the AFDC grant program had to be issued in accordance with Section 553 because the Secretary of HEW had formally adopted the rulemaking requirements of Section 553 for grants.[105] The regulations were invalidated because the requirements of Section 553 were not strictly followed.

Agency adjudication is governed by 5 U.S.C. Section 554. As used in the APA, "agency adjudication" can mean any agency action that is not rulemaking. Adjudication, however, has come to mean agency decisionmaking on the record based on an administrative hearing.[106]

The decision to award or not to award a grant ordinarily falls into an area known as informal agency action which is neither adjudication nor rulemaking.[107] Federal agencies are given considerable discretion in deciding whether to award or not to award grants and there are no provisions of the APA or other laws which establish general requirements that federal agencies must follow in awarding grants.

Where the issue is termination of a grant by a federal agency or suspension of grant funds, many grant statutes provide for a formal administrative hearing.[108] This is adjudication and in some instances these hearings must be carried out in strict accord with the adjudication requirements of Section 554 of the *Administrative Procedures Act.*[109]

Some agencies also provide by regulation for an administrative hearing which is in the nature of agency adjudication. In *Southern Mutual Help Association v. Califano,*[110] the Court of Appeals for the District of Columbia circuit directed the Department of Health, Education and Welfare to follow its regulations and provide a hearing to the Southern Mutual Help Association (SMHA) before refusing to provide further assistance.[111]

Where the question presented is the improper denial of a grant, or the improper award of a grant, the only recourse to those disagreeing with the agency action in the grant area is often a lawsuit in federal court. Such lawsuits can be entertained under the judicial review provisions of the *Administrative Procedures Act.*

In reviewing a federal agency action, the court is governed by the standards of 5 U.S.C. 706, which provides in part that a court shall "hold unlawful and set aside agency actions, findings, and conclusions which are arbitrary, capricious, in abuse of discretion, or otherwise not in accord with law" and "which are done without the observance of procedure required by law."

CONCLUSION

As the forgoing analysis has shown, there is a solid Constitutional and legal foundation for the consideration of issues involving grants. The use of grants as a principal instrument for furthering national domestic policies is firmly established. More uniform application of principles examined in this article will follow in the coming years.

FOOTNOTES

[1] The term "federal grant" as used in this article encompasses any disbursement or transfer of property by the federal government which supports programs and projects that benefit the public and which are accompanied by an agreement by the recipient of the property or disbursement to comply with any terms or conditions on the use of the property or disbursement. The term includes money and land grants to states, units of local government, public and private institutions, and individuals as well as cooperative agreements, revenue sharing payments and in-kind aid, such as purchase of commodities. The United States Office of Management and Budget in Circular A-11, "Preparation and Submission of Budget Estimates," defines grants-in-aid as resources provided by the federal government in support of a state or local program of government service to the public. Under the circular, grants-in-aid include:

a) Direct cash grants to state or local governmental units, to other public bodies established under state or local law, or to their designees (e.g., federal aid for highway construction);

b) Outlays for grants-in-kind, such as purchases of commodities distributed to state or local governmental institutions (e.g., school lunch programs);

c) Payments to nonprofit institutions when:

1) The program is coordinated or approved by a state agency (e.g., the medical facilities construction pro-

gram);

2) Payments are made directly because of provisions of a state plan or other arrangements initiated by a state or local government (e.g., federal aid for higher education),

3) Payments are made with the explicit intent of augmenting public programs (e.g., community action programs);

d) Federal payments to Indian tribal governments, when:

1) The legislation authorizing the payment includes such entities within the definition of eligible state or local units, or

2) The tribal government acts as a nonprofit agency operating under state or local auspices (as described in (c) above);

e) Payments to regional commissions and organizations that are redistributed at the state or local level to provide public services;

f) Federal payments to state and local governments for research and development that is an integral part of the state and local government's provision of services to the general public (e.g., research on crime control financed from law enforcement assistance grants or on mental health associated with the provision of mental rehabilitation services);

g) Shared revenues, a sub-category of grants. These payments to state or local governments are computed as a percentage of the proceeds from the sale of certain federal property, products, or services (e.g., payments from receipts of Oregon and California grant lands) or are tax collections by the federal government that are passed on to state or local governments (e.g., internal revenue collections for Puerto Rico).

[2] In 1963 there were only 160 grant-in-aid programs authorized by the Congress. Grants in the amount of approximately $8.3 billion were awarded to state and local governments. See ACIR, *Categorical Grants: Their Role and Design*, A-52, Washington, DC, U.S. Government Printing Office, Table I-5, p. 22 and Table I-7, p. 25.

[3] Between 1963 and 1967 the number of grants-in-aid more than doubled to the level of 379, and by 1976 there were 447 grant-in-aid programs. *See*, ACIR, *ibid*, Table I-7, p. 25 and p. 5. Federal grant-in-aid outlays to state and local governments are estimated to be $82.9 billion in 1980. MB Special Analyses Budget of The United States Government, Fiscal Year 1980, Washington, DC, U.S. Government Printing Office, p. 212.

[4] OMB, *ibid*. Special Analyses Budget of the United States Government, Fiscal Year 1980, Washington, DC, U.S. Government Printing Office, p. 212.

[5] *See* Davis, Administrative Law of The Seventies (1976), 1977 Cumm. Supp. at 204-205.

[6] These laws impose additional requirements on recipients of all federal grants separate and apart from the basic requirements of the statutes creating the grant program. For a listing of these statutes see (1) Madden, *Future Directions for Federal Assistance Programs, Lessons from Block Grants and Revenue Sharing*, 36 Fed. B.J. 107 (1977), and (2) Madden, *The Right to Receive Federal Grants and Assistance*, 37 Fed. B.J. 17, 20 n. 23 (1979).

[7] 42 U.S.C. §2000d (1976).

[8] 42 U.S.C. §4231 *et seq.* (1976).

[9] *See* Madden, *The Right to Receive Federal Grants and Assistance*, *supra* n. 6.

[10] 262 U.S. 447 (1923).

[11] 297 U.S. 1 (1936).

[12] 301 U.S. 548 (1937).

[13] 330 U.S. 127 (1947).

[14] In *United States v. Butler*, the Supreme Court discussed the authority of the Congress to "provide for the general welfare" as follows:

> As elsewhere throughout the Constitution the section in question lays down principles which control the use of the power, and does not attempt meticulous or detailed directions. Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law. Courts are reluctant to adjudge any statute in contravention of them. But, under our frame of government, no other place is provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we hardly need remark. But, despite the breadth of the legislative discretion, our duty to hear and to render judgment remains. If the statute plainly violates the stated principle of the Constitution we must so declare. 297 U.S. at 67.

[15] "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the States," *Helvering v. Davis*, 301 U.S. 619, 645 (1937).

[16] 17 U.S. (4 Wheat.) 316 (1819).

[17] 17 U.S. (4 Wheat.) at 421.

[18] 71 U.S. 4 Wall. 143 (1866).

[19] "[I]t is not doubted that the grant by the United States to the state upon conditions, and the acceptance of the grant by the state, constitutes a contract. All the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the state, and could not be violated by its legislation without infringement of the Constitution." 71 U.S. at 155.

[20] The Tenth Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. Const. Amend. X.

[21] 17 U.S. 4 Wheat 316 (1819).

[22] 78 U.S. 11 Wall. 113 (1871).

[23] 247 U.S. 251 (1918).

[24] 297 U.S. 1 (1936).

[25] 297 U.S. at 63.

[26] 262 U.S. 447 (1923). The two cases were disposed of together in a single opinion of the Court.

[27] 42 Stat. 224 (1921).

[28] 262 U.S. at 479, 480.

[29] 262 U.S. at 480.

[30] 262 U.S. at 482.

[31] *United States v. Butler*, 297 U.S. 1, 66 (1936).

[32] 297 U.S. at 74.

[33] 297 U.S. at 73, 74.

[34] Corwin, *National-State Cooperation—Its Present Possibilities*, 46 Yale Law Journal 599, 621 (1937).

[35] 301 U.S. 548 (1937).

[36] 301 U.S. at 586, 587.

[37] The *Steward Machine Company* case and *Helvering* v. *Davis*, 301 U.S. 619 (1937), *supra*. n. 30 are sometimes referred to as the Social Security Act cases.

[38] 17 U.S. 4 Wheat. 316 (1819).

[39] 78 U.S. 11 Wall. 113 (1871).

[40] 306 U.S. 466, 486 (1939).

[41] 312 U.S. 100 (1941).

[42] 312 U.S. at 124.

[43] 330 U.S. 127 (1947).

[44] 330 U.S. at 143.

[45] 330 U.S. at 143, 144.

[46] 179 U.S. 223 (1900).

[47] In *Butler* the court stated that:

> Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States . .,.. might be served by obliterating the constituent members of the Union. 297 U.S. at 77 (1936).

See also text acompanying n. 44.

[48] 426 U.S. 833 (1976).

[49] *See* text accompanying notes 58-71, *infra.*

[50] 29 U.S.C. §201 *et seq.*, as amended (1976). The 1974 amendments are found at 88 Stat. 55.

[51] U.S. Const. Art. I, sec. 8, cl. 3. This is commonly referred to as the "Commerce Clause" or "Commerce Power."

[52] 426 U.S. at 842, 843. in this quote, the Court was referring to *Fry v. United States*, 421 U.S. 572 (1975) where the Court held that the *Economic Stabilization Act of 1970* was Constitutional as applied to temporarily freeze the wages of state and local government employees.

[53] 426 U.S. at 851.

[54] 426 U.S. at 852 n. 17.

[55] *See* for example, Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (1977); and Sorett, Materials for Federal Bar Association Seminar on Grant Law, *The National League of Cities: A New Anthem?*

[56] *Supra* n. 14. See also discussion *infra* at n. 72 and following text.

[57] 445 F. Supp. 532 (E.D. N.C. 1977), aff'd 435 U.S. 962, 98 S. Ct. 1597 (1978).

[58] 42 U.S.C. §300k *et seq.* (1976).

[59] 42 U.S.C. §300k(b) (1976).

[60] The judge in *North Carolina* citing an earlier opinion, characterized the inducement in grant programs "as [t]he alternative whip of economic pressure and seductive favor, which are legitimate under the constitutional spending power." 445 F. Supp. at 535 n. 6, citing *State of Maryland v. EPA*, 530 F.2d 215, 228 (4th Cir. 1975), *vacated and remanded*, 431 U.S. 99 (1977).

[61] 445 F. Supp. at 535. The court distinguished the *League of Cities* case in a footnote on two points. First, the court noted that the *National Health Planning Act* did not directly regulate state actions. Second, the court noted that the "constitutional authorization in this case is the spending power" 445 F. Supp. at 536.

[62] 449 F. Supp. 1230 (D. Md. 1978).

[63] The court rejected arguments that *League of Cities* applied to the case, noting that the *National Health Planning Act* "neither impairs the integrity of the states nor unduly restricts the freedom of the states to structure their health care functions."

[64] 449 F. Supp. at 1247.

[65] 439 F. Supp. 1209 (M.D. Ga. 1977).

[66] 439 F. Supp. at 1217, quoted in *Montgomery County, Md.* v. *Califano, supra* at 1249.

[67] 449 F. Supp. 274 (N.D. Fla. 1978), *aff'd.* 585 F. 2d 150 (5th Cir. 1978).

[68] 29 U.S.C. §720 *et seq.* (1976).

[69] 449 F. Supp. at 284. In a footnote to this quote, the court stated that:

> The dissenting opinions of three justices in *National League of Cities* provides additional support for this court's reading of that decision. Apparently it was the understanding of the dissenters that the majority did not intend to rule out Congress' ability to condition receipt of grants-in-aid on compliance with federally imposed restrictions on state government. 426 U.S. at 880, 96 S. Ct. 2465 (Brennan, J., dissenting). 449 F. Supp. at 284. n. 13.

[70] 449 F. Supp. at 284.

[71] The Court may not have been presented with any such problem in examining the exercise of Congressional power under the Commerce Clause because the intrusions by the Congress on a state's power through the Commerce Clause have been more limited and because there is a long history of Supreme Court concern and involvement with the application of the Commerce Clause by the Congress. In such cases as *National League of Cities* where the exercise of commerce power was clearly impeding the effective operation of the state and local government, the Supreme Court struck the action as violating the Tenth Amendment.

The lower federal courts have recently reached similar positions on actions by the Environmental Protection Agency under the *Clean Air Act.* This act is founded on the Commerce Clause. Where the EPA interpreted this act as authority to require states to pass laws establishing standards for clean air, the courts have generally found that such exercise of power by EPA to be invalid because it violated the Tenth Amendment by impermissibly coercing state action. See *Maryland v. EPA,* 530 F.2d 215 (4th Cir. 1975), *vacated on other grounds, sub. nom. EPA v. Brown,* 431 U.S. 99 (1977); and *Brown v. EPA*, 521 F. 2d 827 (9th Cir. 1975), *vacated on other grounds,* 431 U.S. 99 (1977). This author is not aware of a single case where the Supreme Court has found a grant program to be unconstitutional. *See* Comment, *The Federal Conditional Spending Power: A Search for Limits,* 70 NW. U.L. Rev. 293, 307 (1975).

[72] 394 U.S. 618 (1969).

[73] 394 U.S. at 641.

[74] 403 U.S. 672 (1971).

[75] 42 U.S.C. 6701 *et seq.* as amended (1976 and Supp. I 1977).

[76] The MBE provision, which appears in Section 103(f)(2) of the PWE Act, 42 U.S.C. §6705(f)(2) reads as follows:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percentum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

[77] 584 F.2d 600 (2nd Cir. 1978).

[78] 584 F.2d at 602.

[79] 48 L.W. 4979 (1980).

[80] 48 L.W. at 4986.

[81] 454 F. Supp. 766 (C.D. Calif. 1978). The district court noted that in 1978 bills had been introduced in the Congress to provide additional funds for grants under the PWE Act. 454 F. Supp. at 775.

[82] U.S. Const., Art. VI, cl. 2. The clause reads as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme

> law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

[83] 392 U.S. [illegible] (1968).

[84] 392 U.S. at 316.

[85] 392 U.S. at 317.

[86] 392 U.S. at 333, n. 34.

[87] 404 U.S. 282 (1971).

[88] *Youakim v. Miller*, 425 U.S. 237 (1976) and *Miller v. Youakim*, __ U.S. __, 99 S. Ct. 957 (1979). These cases arose under the Aid to Families with Dependent Children grant program and were brought by foster parents, who were caring for wife's minor siblings, to enjoin state foster care plan which provided higher AFDC benefits to unrelated parents than to related parents. In the first of the cases, the question of whether Illinois law conflicted with the *Social Security Act* in violation of the Supremacy Clause was referred back to the district court for resolution. 425 U.S. at 233 and 237. The second case was an appeal from the judgment of the district court which found that the Illinois law conflicted with the *Social Security Act* and was invalid under the Supremacy Clause. 431 F. Supp. 40, 45 (N.D. Ill. 1976) *aff'd.* 562 F.2d 483. On appeal the Supreme Court affirmed. Other cases include: *Carleson v. Remilland,* 406 U.S.598 (1972); *Van Lane v. Hurley,* 421 U.S. 338 (1975); and *Philbrook v. Glodgett,* 421 U.S. 707 (1975). In the 1978 *North Carolina* case cited earlier, the Supreme Court in affirming the district court decision upheld a determination by that court that a state constitutional provision that was inconsistent with federal law governing the expenditure of grant funds was invalid under the Supremacy Clause. 445 F. Supp. at 536.

[89] 71 U.S. 4 Wall. 314 (1866).

[90] 71 U.S. 4 Wall at 318.

[91] Corwin, *The Constitution and What it Means Today,* 88 (1964).

[92] 414 U.S. 563 (1974).

[93] 414 U.S. at 568, 569. *Lau* was a contract case. The Court expressly stated that it did not decide the matter on the basis of the Equal Protection Clause of the 14th Amendment but instead relied "solely" on Title VI of the *Civil Rights Act.*414 U.S. at 566. The Court held that the failure of the San Francisco School System to provide English language instruction to students of Chinese ancestry, who did not speak English, or to provide these students with other adequate instructional procedures denied these students a meaningful opportunity to participate in the public education program. In a concurring opinion, joined by the Chief Justice and Justice Blackman, Justice Stewart found that the respondents, the students of Chinese ancestry, were suing as "beneficiaries of the federal funding contract between the Department of Health, Education and Welfare and the San Francisco United School District." 414 U.S. at S 71 n.2 (Stewart, J. concurring).

The Supreme Court's decision of last term in *Chapman v. Houston Unified Welfare Rights Organization,* 441 U.S. 600 (1979), highlights the importance of the contract argument. In that decision, Justice Stevens held, despite a long series of decisions which appear to be to the contrary (see Stewart dissent 441 U.S. at 672), that an intended recipient of funds under federal grant programs could not establish jurisdiction to contest an action by a state grantee in denying benefits under the grant statute and 42 U.S.C. §1983, which provides that every person who under color of state law denies another person any rights, privileges or immunities secured by the Constitution and laws of the United States shall be liable to the person injured in an action at law.

Prior to *Chapman* under *Rosado v. Wyman,* 397 U.S. (1970) and other cases cited *supra* at note 88, the Supreme Court held that suits in federal court by intended beneficiaries of grants are proper under 42 U.S.C. § 1983, the *Social Security Act,* and 28 U.S.C. §1343 to secure compliance with the *Social Security Act.*

Third party actions which are not based on Constitutional claims must be founded on 28 U.S. §1331, the general federal question statute which requires that the amount in controversy exceed $10,000. In the *Chapman* case the issue was a conflict between state law under the AFDC program and the *Social Security Act.* The Court held that the fact that the Supremacy Clause was an issue was not a sufficient basis for invoking a Constitutional claim under 28 U.S.C. 1343 and dismissed the suit because the plaintiffs did not meet amount in controversy requirement. 441 U.S. at 600. Because of the Supreme Court's decision in *Cannon v. The University of Chicago,* 441 U.S. 667 (1979), the third party beneficiary issue is of less significance in establishing jurisdiction of a federal court to hear complaints of intended beneficiaries of federal grant programs where such complaints may arise in areas protected by Title VI of the *Civil Rights Act,* Title IX of the *Civil Rights Act,* and Section 504 of the *Rehabilitation Act of 1973* and their analogues. In *Cannon* the Supreme Court found that a woman who established a prima facie case of discrimination by the University of Chicago in violation of Title IX had an implied right of action under Title IX and under the Supreme Court's rationale in *Cort v. Ash,* 422 U.S. 66 (1976) to bring the action in federal courts. *See* also Madden, *The Right to Receive Federal Grants and Assistance, supra* note 6.

[94] 49 U.S.C. §1701 *et seq.* (1976).

[95] *Miree v. DeKalb County, Georgia,* 433 U.S. 25, 97 S. Ct. 2490 (1977). *See also Wheeler v. Barrera,* 417 U.S. 402 (1979), where the Supreme Court examined grants made under Title I of the *Elementary and Secondary Education Act* of 1965, *supra.* The Court was asked to find that the State of Missouri was not carrying out the terms of the grant as awarded by the Department of Health, Education and Welfare. The Court remanded the case to the district court with instructions "simply to assure that the state and local agencies fulfill their part of the Title I contract if they choose to accept Title I funds." 417 U.S. at 427.

[96] 97 S.Ct. at 2494.

[97] In *Euresti* v. *Stenner,* 458 F.2d 1115 (10th Cir. 1972), the court considered an action brought under the *Hill-Burton Act,* 42 U.S.C. §291 *et seq.,* to enforce assurances in a grant for the building of a hospital. The action was brought by poor people as third party beneficiaries of assurances in the grant that there would be made available in the facility a reasonable amount of services for people unable to pay for the services. The district court concluded that the *Hill-Burton Act* did not create a contractual relationship between the United States and the grantee. The Court of Appeals found that there was a contractual relationship and went on to find that:

> The contract between appellees and the State of Colorado explicitly incorporates the federal statutory obligation. In turn, the state's obligation to provide assurances of compliance is the *sine qua non* for the furnishing of federal funds. Indeed, appellee's obligation is set out specifically in the closing papers signed by the hospital, the state and federal authorities. Nothing could be clearer: In receiving federal funds, appellees obligated themselves to dispense a reasonable amount of free hospital services to those unable to pay. 458 F.2d at 1118-1119 (footnote omitted).

In a leading case, cited by the Supreme Court in *Lau,* the 5th Circuit in *Bossier Parish School Board v. Lemon,* 370 F. 2d 847 (5th Cir. 1967), held that certain black children living in Bossier Parish were third party beneficiaries of an agreement arising out of a grant made by the federal government to the

Bossier Parish School Board and, as third party beneficiaries, they had a right to seek to enforce the terms of the agreement for their benefit between the United States and Bossier Parish.

In *City of Inglewood v. City of Los Angeles*, 451 F. 2d 948 (9th Cir. 1971), the 9th Circuit held that the City of Inglewood was the intended third party beneficiary of assurances contained in a grant awarded by the Federal Aviation Administration to the City of Los Angeles, and that Inglewood could, therefore, bring an action to enforce the terms and conditions of the grant agreement which were designed to benefit Inglewood.

Other cases involving third party beneficiaries include *Ramirez Leal v. City Demonstration Agency*, 549 F.2d 97 (9th Cir. 1976); *Natonabah v. Board of Education of Gallup-McKinley City School District*, 355 F. Supp. 716 (D.N. Mex. 1973); *Poirrier v. St. James Parish Police Jury*, 372 F. Supp. 1021 (E.D. La. 1974), *aff'd per curiam*, 531 F.2d 316 (5th Cir. 1976). *See* also discussion in n. 93.

[98] 42 U.S.C. 501 *et seq.*

[99] Professor Kenneth Culp Davis defines administrative law as follows:

> Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action . . . . Simpler definitions are about as good: Administrative law is the law of governmental administration. One who 'administers' is one who is carrying out governmental objectives. Administrative law is the law that governs those who administer any part of governmental activities. Davis, *Administrative Law Treatise*, §1.1 (2 ed. 1978).

[100] 5 U.S.C. §§551-559, 701-706.

[101] For a comprehensive examination of the impact of the *Administrative Procedures Act*, reference should be made to the treatises and updates of Professor Davis, including the 1958 *Administrative Law Treatise* and its 1970 update, Davis, *Administrative Law of the Seventies* (1978) and the 2nd edition *of the Treatise*, *supra* n. 99.

[102] The term rule as used in the *Administrative Procedures Act* includes "[t]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" or which describes "the organization, procedure or practice requirements of an agency . . . " 5 U.S.C. §551(4). Rulemaking under 5 U.S.C. §553 is sometimes referred to as "informal" rulemaking to distinguish it from "formal" rulemaking carried out pursuant to 5 U.S.C. §§556 and 557. "Formal" rulemaking encompasses rulemaking required to be made on the record after opportunity for an agency hearing. Formal rulemaking has little application to grants because grant regulations are generally not required to be made after opportunity for an agency hearing.

The rulemaking requirements of §553 are applicable to what are sometimes referred to as "substantive" rules. The requirements are not applicable to what are called interpretive rules or statements of policy. The difference between substantive and interpretive rules is one of the more complicated issues that has arisen out of the implementation of the *Administrative Procedures Act*. As a general statement, an interpretive rule does not make new law or policy but merely explains what Congress intended by a particular statute.

Under Section 552 of the *Administrative Procedure Act*, interpretive rules and statements of general policy must generally be required to be published in the *Federal Register*. If not published in the *Federal Register*, they must be incorporated in a grant before they can be held to be binding on a federal agency. On this latter topic *see:* Yamada, *Rules Related to Federal Grant Programs*, 38 Fed. B.J. __ (1979).

[103] It is expressly provided in Section 553 that its provisions do not apply to matters "relating to . . . loans, grants, benefits or contracts and the courts have recognized that agencies issuing grant regulations are not bound by the notice and comment provisions of Section 553. *See Rodriquez v. Swank*, 318 F. Supp. 289 (D. Ill. 1970) *aff'd without opinion*, 403 U.S. 901 (1971); and *Opelika Nursing Home, Inc. v. Richardson*, 356 F. Supp. 1338 (M.D. Ala. 1973), *aff'd*, 490 F.2d 841 (5th Cir. 1974). Although notice and comment are not necessary, grant regulations may still have to be published in the *Federal Register* under 5 U.S.C. §552. *See* Yamada, *supra* no. 102.

For a general discussion of rulemaking and grants see: Madden, *The Right to Receive Federal Grants and Assistance*, *supra* n. 6; Sky, *Rule Making and the Federal Grant Process in the United States Office of Education*, 62 U. Va. L. Rev. 1017 (1976); and Bonfield, *Public Participation in Federal Rule Making Relating to Public Property, Loans, Grants, Benefits or Contracts*, 118 U. Pa. L. Rev. 540 (1970).

[104] 533 F.2d 637 (D.C. Cir. 1976).

[105] The Secretary, by a notice in the *Federal Register*, 36 Fed. Reg. 2532 (1971), adopted the rulemaking requirements of 5 U.S.C. §553 for all HEW rulemaking. HEW, the court found, was therefore bound to follow the requirements of §553. There is a three-step process which the court held must be followed in order to meet the requirements of Section 553. This three-step process was outlined in an article quoted by the court in *National Welfare Rights Organization* as follows:

> Step one of Section 553 will yield the agency's initial proposal, its tenative empirical findings, important advice received from experts, and a description of the critical experimental and methodological techniques on which the agency intends to rely. Step two will produce the written or oral replies of interested parties to the agency's proposals and to all the other 'step one' materials. And step three will furnish the final rule, accompanied by a statement both justifying the rule and explaining its normative and empirical predicates through reference to those parts of the record developed in steps one and two. 533 F.2d at 649.

The HEW regulations were struck down because the regulations did not have a firm empirical base and did not meet the requirements of §553. Most grantmaking agencies now follow §553 procedures. *See* Fed. Reg. 36412 (1978). In addition, all federal agencies are required to obtain comments of affected state and local governments in issuing major federal regulations. *See* Executive Order 12.044, 43 Fed. Reg. 12661 (1978).

[106] *See* Davis, *Administrative Law of the Seventies* §1.01-1 and Davis, *Administrative Law Treatise* §1.4 (2d ed. 1978).

[107] " 'Informal action' means in the prevailing usage, any action (or determination in favor of inaction) that is taken without a trial-type hearing." Davis, *Administrative Law Treatise*, §1.4 (2nd ed. 1978). The bulk of federal grantor agency actions can be characterized as informal actions. In only very narrow instances, such as termination of grants or suspension of funding, is a trial-type hearing required.

[108] *See* Madden, *The Right to Receive Federal Grants and Assistance*, *supra* n. 6 at 46 and 47.

[109] No grant can be terminated by the Law Enforcement Assistance Administration until the grantee has received notice of the intended termination and has been given an opportunity for a hearing on the record in accordance with 5 U.S.C. §554. *See* 42 U.S.C. §3757 (1976).

[110] 574 F.2d 518 (D.C. Cir. 1977).

[111] The Department of Health, Education and Welfare has promulgated regulations which require the agency to hold hearings, if requested, before terminating grants, and the Court of Appeals found that HEW had terminated SMHA's grant and SMHA was entitled to a hearing.

A Response

by Robert Wallick
Steptoe & Johnson
Washington, DC

Unfortunately, we have only a brief time this morning for a very large subject. First off, I would like to point to a paradox that a few in this room have heard me address before.

I had the pleasure of visiting The People's Republic of China this fall with my wife and an interesting paradox came through to me then. China certainly has one of the most controlled and regulated societies in the world. They're incredibly well organized and controlled and would be the delight of any computer-type organizer.

On the other hand, they have almost no written laws and regulations. We, the land of the free and the home of the brave, are being inundated by laws and regulations. While some would say that our freedom comes out of the latter and there is a certain element of truth in it, I would like to point out that the real basis for this surge for laws and regulations is the fact that we have a historic aversion to *ex post facto* type laws. We feel that everybody should know in advance whether what they're doing is right or wrong. But of course, we've long passed the point of diminishing returns and the vast amount of material we're putting out makes it less likely that people will know what the laws and regulations contain. A second reason for our excessive laws and regulations is that we want to reduce arbitrariness of decision and to a certain extent that happens.

I want to address in my brief time three questions. What is this set that we call the law of grants? What should the role of that law be? And finally, what is the balance of interest between the grantee and the grantor? I'll hasten to add that my perspective is probably biased toward the set of people known as grantees. I have not had considerable experience with third-party litigation except with contractors.

Now, when we talk about what is the set that we call the law of grants, we must consider the parameters set by the U.S. Constitution. Since Tom Madden has addressed these, I won't deal with them here. I will give you a reaction that perhaps that not all speakers will share. I think the limits that the federal government has upon its actions are very distant and very thin. I believe that the Constitution is, in fact, a sword which the Congress and the federal agencies can utilize to carry out almost anything they want to carry out, within reason. We know they can't call for the execution of the Governor of the State of Alabama, but, within reason, they can do almost anything they want.

When you look at *North Carolina v. Califano* and other cases where the Constitution could have been raised, like *Lau v. Nichols* and *Bakke*, the Constitutional limits are very thin. The power of the government in the grants area is interpreted very broadly. Someone may come along with a case, but no one has yet.

The second large group of what we call the law is, of course, statutes enacted by Congress. These statutes deal with crosscutting conditions; they deal with the direct program requirements. I know of no effort in Washington, DC, that is more important and has less chance of success than ACIR's effort to consolidate and make uniform these laws. I think it's an absolute must that this happen, but I think it is absolutely inconceivable that it will happen unless there's a groundswell of political support that's not now apparent. Many of our problems have their foundation in the differences in statutes, differences that really aren't needed, at least in my humble opinion.

The second aspect of this statutory question is the question of these crosscutting conditions, and I would respectively suggest that ACIR is dead wrong when it says that what we need is to achieve uniformity of enforcement by placing enforcement in the hands of a single agency whose principal responsibility may be that enforcement. If you want these programs to grind to a screeching halt, you go that way. I think that with all due respect to the importance of environment, employment, and historical considerations, they need to be balanced against other considerations. And you can only achieve that balance in some tribunal that has all those responsibilities. So I believe that ACIR is making a serious mistake in its present effort.*

The next areas are Presidential and executive orders and OMB circulars. This is an area that's growing, at least in part, due to the fact that our circuit court of appeals is very reluctant to challenge a Presidential exercise of executive order. I direct your attention to *AFL/CIO v. Kahn* which upheld the President's efforts to set up a debarment of government contractors when they violated price and wage orders outside of the government contract area with little, and essentially no, statutory base of the fact. This holding illustrates that the executive order route is open to Presidents and is being utilized in many ways. I believe this route will be increasingly important unless Congress gets its act together better.

The next is agency regulations and other agency promulgations. The last time I spoke on this issue I got into trouble, so I'm going to put on my bicycle helmet that I wore down to work this morning. The last time I discussed this area, I had one agency—UMTA—call me and berate me for half an hour. That agency had just put out a thick and well written, well thought through, careful set of guidelines for procurement under OMB Attachment O. UMTA believes these guidelines are good. And it is true that most people utilizing them like the regulations because they tell them exactly what to do. But when you think in a specialized area, purchasing, under one program, UMTA, we have something so thick, you have to be concerned about where we're headed in this regulation area. I think this specificity is a very dangerous trend. But it's because people out in the states and the localities want to know exactly what to do. They like to becry the thickness of regulation, but on the other hand they want to be told specifically what the requirements are, in what I believe is a misguided effort to reduce arbitrariness of decision.

And finally there is this great body of decisional law which Tom is addressing in the Constitutional

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*ACIR's approach calls for the President to specifically designate not one but several agencies in various policy areas to be responsible for one or more crosscutting statutes. These designated agencies would be responsible for developing standard rules and requirements for the statutes they have been assigned and they would be required to issue these standards within two years of the date of their designation.

“I submit that a law, if it’s really good, should be almost self-enforcing.”

area and in administrative procedures area where there are large conclusions to be drawn. But unfortunately the individual acts are so different, conclusions are difficult to draw.

The next area I want to address is what should be the role of the law? I would say the role of the law is to define a matrix for carrying out the program. It’s not policy. Somebody else sets the policy. The question is defining a matrix. And the second aspect is the thunderbolt principle of how you zap significant departures from the matrix.

I submit that a law, if it’s really good, should be almost self-enforcing. The best things come when we don’t have the Justice Department trying to decide whether to bring suit.

The law should be balanced. It must be [illegible] fective and efficient. Now those are not necessarily compatible requirements and they require some balancing within them. But I think those are important principles.

Now, let’s get to this question of balance between the grantee and grantor. On the governmental side—and I mean the federal governmental side—there are some fearful thunderbolts. The feds can cut off the funds, terminate or cancel grants, or decide whether to refund or reissue a new grant. These are fearful thunderbolts for you and me. The problem is, how do we get some balance? Several recent court cases really involved this question: “How far can the federal government reach out to require something once it’s made a grant action? Even if you don’t want the grant money, how much can it require?” What can the grantees do?

The grantees can follow the procedures set out by the *Administrative Procedures Act* and the *Tucker Act* but those are pretty tough. You’d have to show a pretty arbitrary decision. If an agency hangs you with due process, you have a tough time trying to upset it.

There are some hopeful signs in the growing volume of additional administrative procedures and forums. We have administrative law judges at Labor and HUD deciding whether the disqualification under a mandatory grant is or is not right. We have grant appeals boards like HEW’s coming along. We also have some less formalized procedures such as those used by LEAA. The critical point in these is that they have to be impartial. If you are going to have an effective say in these boards, these administrative remedies have to be impartial. We also need finality of decision. I am appalled when I hear people discussing seriously the question whether a board’s decision should be final or whether the head of the agency can ignore it.. Why should we go to one if they’re not going to be final? The decisions also have to be effective and efficient. And again those are not necessarily consistent requirements.

In spite of the increasing efforts to provide more remedies in the administrative arena, it will not be simple becaue you have crosscutting conditions and the crosscutting condition isn’t going to likely wind up in front of HEW’s board. It’s going to wind up somewhere else. And you may have to appear before three boards on a termination. But that’s an area that I hope all of us in this room will watch carefully and get interested in.

A distinguished member of ACIR once told me that you spell grants “M-O-N-E-Y.” And I think that’s true. Everybody certainly focuses on money and getting their share. But the money supply has tightened down. Thus this question of balance becomes increasingly relevant. Giving the grantee a few thunderbolts as well as the grantor is very important.

A Response

by Malcolm S. Mason
Chairman
Departmental Grant Appeals Board, HEW*

I'm very pleased to be able to talk under the auspices of the ACIR because ACIR has brought to the subject of grants a breadth of perspective that is rare and very valuable.

Tom Madden, Bob Wallick, and I have formed a kind of team. Wherever there's an empty rostrum, we take it. And we have a set pattern that we follow in our talks. No matter what the subject is, Tom gives you a wealth of information, particularly about the case law, and Bob gives you a rich insight into the typologies that are involved. Then when it's my turn, I tell you that what they have said is all wrong from beginning to end. And that's what I'm going to do here today.

We started out as good friends and I hope we will continue to be good friends, although when I saw Bob wearing his helmet this morning I was a little afraid that maybe our relations were impairing.

The first issue on which Tom, Bob, and I are in basic disagreement is typified by Tom's remark this morning—that if you want to know where we're headed, first you have to know where we are. You know that sounds reasonable, very plausible, but it's got some dangerous implications. The dangerous implication is that it canonizes the static. It emphasizes the outmoded paths. And if we're interested in where we're headed, we have to be interested in a dynamic process and we have to be talking about the future, not the past. And that's an important change of perspective that is vitally necessary. If I have time I'll give you a couple of examples of that, but I'm bound to give you at least one. This is one on which, again, we inevitably disagree. Tom tells you that a grant is a contract. And when Bob addresses this question he generally says that it is clear that a grant is a contract. And my view, which I generally try to state in very restrained and understated terms, is:

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*Malcolm S. Mason retired from this position in the spring of 1980.

No!

That point of view of a grant is plausible but it is fallacious, misleading, and dangerous. The reason that it is, is precisely the basic point on which we differ. It sanctifies the dead past. It rests on cases like *McGee* and *Mathias*, of 1866 or something like that, and cases that have blindly quoted *McGee* and *Mathias* ever since. Just think back. First of all, that case and others like it did involve grants, but they were land grants. They were simply conveyances. That's what grants meant back in those days and, moreover, they were fully executed on one side. What is more important is that when these cases were decided there was no system of grants such as we have today and there was not even the beginning of grant law. Courts had to reach for some kind of parallel, some kind of example, some basis on which to rest the decision. They did the best they could. It's an example of reaching. But it's time that we recognize that what those cases dealt with has nothing to do with the grant system as it is today or as it's going to be next year and the year after. And that's what's important.

When I went to law school, which was a long, long time ago, we used to debate cases involving automobiles. At that time there was no automobile law. Today there are encyclopedias, there are libraries, of automobile law. But then there was no automobile law. So what did you do? You reached for the cases about horses and wagons—vehicle law—and you applied those cases to the automobile. You knew you were wrong, if you had any sense, but you also knew that you had to find some kind of precedents, some kind of basis and you reached for it.

You knew, of course, that the horse and wagon did not have a wheel that might come off and roll 60 miles an hour and kill somebody. It wasn't a terribly good precedent, but it was the best you could do. But at some point you had to begin to recognize that the horse and buggy cases didn't fit the automobile.

And then a little bit later, about the time I started practicing, we got airplane cases. There was not an airplane law then as there is now. So we took the automobile cases and tried to build some kind of precedents to apply to airplane cases. Of course that's how lawyers work but that's why you get this misguided notion that grants are contracts. But it's time we moved into the jet age. And if we're interested in really looking to the future of grant law, we'd better get rid of this notion. There's a very important parallel that you might consider.

Suppose you were practicing marriage counseling and some client came in. You reach for your Williston and you say now of course, marriage is a contract. That's right, marriage is a contract. There is an offer and an acceptance and you hope that each side gets something out of it. That's called consideration. There is appropriate formality. But if you start advising your clients on that basis, you're going to do them an awful lot of harm. You're going to make some very flagrant mistakes. For example, Williston will tell you since it's a contract that you can terminate it by mutual decision. Two parties agree. That's it. Marriage is over. You can have innovation. A husband can substitute an appropriate . . . Well, that's the law of contracts.

The essential point is, sure, as an elegance of discourse you can say that a marriage is a contract and that a grant is a contract, but don't believe it. Don't act on it. Don't get taken in by your metaphors.

General Discussion

Wayne Anderson, Executive Director, ACIR: Talk about laying a perfect basis for a question period. He left us hanging there a little bit with an element of suspense. Thank you Malcolm and the other speakers. First Tom and Bob, do you want a minute for rebuttal? Then we'll have time for a few questions.

Wallick: I would just say to my colleague that I agree that grants are a special kind of contract that deserve special attention. It is a fact of life that the courts are putting it into the cubicle of being contracts because they do satisfy Williston. I certainly subscribe whole-heartedly to the idea that treating a grant like a procurement contract for instance, would be a poor and very dangerous idea.

Madden: I don't really think there's that much difference between Malcolm and Bob and me. We've been through this periodically. The point I'm trying to make is one that Bob made. A grant is a contract in the traditional sense. The courts have recognized that. And it's important to understand that because you've got to deal with the courts and the courts have to see something they understand. The analogy to the vehicle laws is a good one. It's exactly how it's developed. We've developed from the vehicle law to the automobile law to the airplane law. And it provides the useful framework for the courts which deal with hundreds of cases.

As the result of considering a grant or a contract, we enter into the remedies area Bob talks about. And the court is able to structure certain remedies which go to the enforcement. But a grant is not a federal procurement contract. It is not governed by the federal procurement regulations or the armed services procurement regulations or any of those terms and conditions that govern federal procurement contracts. *The Federal Grants and Cooperative Agreement Act* makes very clear that there is an instrument called a grant, there's an instrument called a cooperative agreement, and there's an instrument called a contract. Each of these are different instruments and each has different legal implications. So I think when you look at it from the standpoint of remedies, it's important that you understand that the courts are going to look at this as a contract.

But we all know that there's a political dimension and a social dimension to grants that transcends any contractual considerations. And much of the activity that occurs in grant areas has got to be measured in this particular political context. It's got to be measured in the context of the statute under which a grant is enacted, what Congress intended and how state and local governments operate. And much of the action takes place in this informal level within an agency between state and local governments. It doesn't get us involved in the rights and remedies of grants except as a last resort.

Anderson: Malcolm, I think you ought to give us your capsulization of what it is. Is it a cooperative agreement subject to political execution or what do you call it?

Mason: Well, in simple terms, I think a grant is a unique relationship created by statute. You do not look to the law of contracts. You look to the statute that governs. Every grant program is created by statute. It must be created by statute, and it's governed by statute. I'll give you another example: The rights and duties of an officer in the army. You can describe them in the same way, as an offer, an acceptance, a mutual benefit. It's a contract. But people who tried to assert their rights on the basis of contractual analysis properly got slapped down. Their relationships are governed by the defense laws of the United States, by the statute.

Anderson: Very good. So you state and local recipients consider yourself to have as much flexibility as an officer in the army.

Wallick: Let me make one other comment. There's a great contracts professor at Yale Law School, Grant Gilmore, who wrote an excellent book about four or five years ago on the death of contracts in which he thinks the whole idea of contracts is pushed upon us improperly and just a subset of a tort law. So he would go even further than Malcolm has.

“We all know that there's a political dimension and a social dimension to grants that transcends any contractual considerations.”

Anderson: The whole institution is shaky. Here we have a question.

Lincoln Hoewing, Senate Subcommittee on Intergovernmental Relations: State and local governments are increasingly using the referendum to decide questions. I can give you a specific example in my town, Poolesville, MD. It is a small town where we use the referendum to decide many public questions. One of the things that came up recently was that under the community development block grant, there's a certain percentage of housing that has to be low income housing. The town wanted to withdraw from the program because of that requirement. However, in a referendum, the people voted to continue the program by a vote of about 2-to-1. I'm bringing this up because of the voluntary nature of grants. How can a grant be considered voluntary when the town's citizens voted to continue it but the town's commissioners did not?

Madden: That's the exact issue in the case of *Angell v. Zinsser* and was an issue in another case, *Shapp v. Sloan,* and maybe George Brown can talk a little about that when he gets into the next panel. You have this problem in grants. We'll call it an assumption of cost. It's a generic problem. And that's a problem you've got in the community development block grant. Presumably the town commissioners for the first two or three years in Poolesville or in Manchester, CN, acted under what they thought was the mandate that the people of the town wanted them to act under. They carried out their delegated authority and they proceeded to accept these grants. And each year they accepted those grants they made certain assurances that x percentage of the new housing built in that town would be low income housing or there would be adequate provisions made for low income housing people.

You then, in our political process, get a change. People's views change. People's attitudes change. New commissioners are brought in. In this case a new referendum was passed which said we don't want to provide this housing in this town. We're satisfied with the way the town is structured. And yet you have this receipt of funds by this jurisdiction tracing back three or four years with these assurances. And that's what the court's going to have to decide in the *Angell* case.

I could take a hard line and say that the assurances were made by proper representatives of that city and this gets us into the contract area. The city is therefore bound by those assurances and must provide the housing. And that's the position that the government is arguing in the case as well as saying that in addition they're bound to take the grant because the grant will have money in it in this fifth year that will enable the town to build and provide low income housing for people.

Hoewing: The thing that raises is if a grant is truly voluntary, you shouldn't rely on past assurance. It should be a yearly thing.

Madden: Let me give you an example. Yes, you would say it should be surely voluntary. But the courts, particularly in the civil rights area, have taken a different view, and I think rightfully so. Take the case *Bossier Parish School Board v. Lemon*, a federal court case decided back about 1964. You had a jurisdiction take money throughout the 1950s on an assurance that they would provide, without regard to race, color or creed, education for the dependent children of military personnel located on the military base in Bossier Parish. They took the money. They built a public school with the money. Title VI of *Civil Rights Act of 1964* was passed. They took money for about six months. Then Bossier Parish realized what Title VI meant and they stopped taking the money. They refused to admit the black children to the schools on an equal basis with white children and Lemon, who was a military dependent, went to court and the United States joined them and sued. They said, look, you took the money, you built the school, you've got to provide schooling. You made that assurance. And I think you have to understand in our government we may have independent government but they're dependent also. There were assurances made. The citizens cannot go back and renege them without violating the provisions in the grants.

Part III

The Interaction of Federal Grants and the Law: Community Development and LEAA Litigation

by Tom Moody
Mayor
Columbus, Ohio

I have a special interest in the issue discussed today since I am a lawyer and I have served as a judge in two state trial courts. But I gave up all that nonsense and became Mayor some eight years ago. And my experience with the federal grants system is very largely that of being a Mayor. My experience as a judge with federal grants had more to do with trying to get them for the court system than it did judging anything about them.

My experiences with both the courts and in the Mayor's office lead me to the conclusion that a conference like this is an excellent idea. There needs to be more of a melding between the fields of policy and the field of the law. And if we at ACIR can help to contribute to bringing these two fields together by bridging that gap that currently exists between the two, so much the better. I believe that we've taken a step in the right direction today.

My task at this point is to lay the groundwork for our next session dealing with recent legal activity relating to two important block grants, community development and LEAA.

Perhaps it is both ironic and at the same time understandable that these two block grants, designed to allow state and local recipients some discretion in how those federal dollars can be used, are prime candidates for legal battles.

Probably the best known of the community development cases is *Hartford v. Hills.* This was a

1976 case in which the city of Hartford objected to the fact that its seven suburbs were not complying with the provisions of low income housing required in the *Housing and Community Development Act of 1974*.

The most recent and ongoing case involves the town of Manchester, CN, which is trying to withdraw from the community development program since it does not want to provide low income housing necessary under the act. That case was referred to several times in our earlier discussion today.

No less politically and powerfully charged are cases relating to LEAA. One of the best known recent cases is another one that was mentioned early this morning, *Shapp v. Sloan*, a state court case which involved LEAA funds. The issue at question in that case was the state legislature's right to appropriate federal dollars, LEAA dollars, in violation of the statutorialy required and Governor-approved state plan for spending those dollars.

The case was appealed to the U.S. Supreme Court which dismissed it for want of a federal question.

Our speaker on the topic can follow up here and tell us what has been going on since. I don't believe that we've heard the last of this issue yet. And, as a matter of fact, I will tell you that as a scheming Mayor I am thinking of ways to avoid the necessity to consult with the counsel on how to spend the federal money because of this kind of activity.

These cases and others that our two panelists will mention point out one of the key questions of our conference today and indeed of the entire area of federal grant law. This question relates to the relationship between the grantor, the federal government, and the grantee. In this case we're talking about local and state governments. There are some indications that the recipients of today are less willing to sit back and quietly acquiesce to Washington's desires in this area. A decade ago suing a grantor agency was an extraordinary act. Today it is frequent, even commonplace. And picking up on what Malcolm Mason mentioned earlier this morning, I would say that there is something else that is happening which was not mentioned this morning, and that's what goes on in conversation short of lawsuits. There is building a considerable body of de facto unwritten and unknown law because of negotiation between the feds and the local governments. And it is a way of resolving lawsuits and this does not become a part of the literature or the standards. But nonetheless, I would have to regard that as a kind of de facto law, if that makes any sense at all. It's a contradiction in terms but indeed the practice is a contradiction in terms.

> **"Many of the controversies between the feds and the locals occur not within the main mission of the contract but rather relate to some of the excess baggage that goes along in those things."**

These lawsuits can seek to overturn grantor fiscal actions based on noncompliance with federal strings. Or they can seek to prove grant regulations are illegal or unconstitutional. They can challenge federal denial of reimbursement for claimed costs, or they can question in court the denial of a discretionary grant.

There is also another area which I think we have to give constant attention to, but we will not dwell on it long today, and that is that many of the controversies between the feds and the locals occur not within the main mission of the contract but rather relate to some of the excess baggage that goes along in those things.

Let me give just an example from quite a different field. I have never had a fight with Washington about the community development act, about General Revenue Sharing, about any of the Department of Labor acts on the main mission of those agreements. My fights are on peripheral matters such as whether or not we have complied with requirements for affirmative action with regard to minorities and women, and a whole host of other such things which are really appendages. I don't mean to minimize these. We're not questioning the need for affirmative action and the involvement of women and so on, but they're attached to each one of these things. And this, of course, leaves me to comment on something that Bob Wallick spoke about, the single enforcement agency which he thinks is a bad thing. And I really agree with him from a philosophical point of view, but my philosophy soon dissipates when I'm waging the same war on the same issues with the same facts on seven different standards with seven different agencies enforcing civil rights, for example. And really what I want to do is do something about housing.

So we have some big dilemmas, both in philosophy and practice, that we have not successfully resolved as a society.

The result of all this has been a burgeoning of cases falling under the grant law rubric. One thinker on the subject, Richard Cappelli of Temple University School of Law has devised a five-part answer to the question, '"Why has grant law so exploded?" As one part, he notes the change in thinking about the grant from the concept of a gift to that of an entitlement. The ever increasing complexity of federal grants, not the least of which is the popularity of the crosscutting requirements, a frequent target of ACIR criticism, is also part of the answer.

The tremendous explosion in the number of grantees, primarily due to General Revenue Sharing and block grants, is also a factor. I think most of you are acquainted with the fact that General Revenue Sharing reaches some 39,000 units of state and local governments. It is certainly the broadest grant program which has ever occurred.

The increasing use of formula entitlement rather than discretionary grants and increased availability of the federal court jurisdiction to handle this type of dispute complete the complicated answer.

Many of the doctrines which once barred access to federal courts, such as a sovereign immunity, are either gone or in serious disarray today. The continued emergence of these factors and the willingness of states and localities to fight back lead one to the conclusion that this activism in the grant law area will continue to increase over the next decade.

There is another area that I think will contribute to increasing litigation and short of litigation increase arguing. And that is that in this day of grantsmanship and state and local dependence upon the distribution of the so-called federal largesse, we are seeing more and more fights among the locals about who is getting his fair share. It's the argument of the kids dividing up the pie that mother has baked. And those arguments are assuming greater and greater importance both in the political support for legislation and in the attacks against the institutions and agencies which must make those allocations because so many of us feel that the formulas are either incorrect when devised or incorrectly applied. And the agencies which have long been rather off to the side in terms of our national history, have now become very important to a lot of local people because of the role that they play in our formula distribution.

I would just cite as an example the fact that I have had an eight-year running battle with the Bureau of Census because they do not know how to count, and they seriously underestimate the population of my community which shorts us in some of our distribution formulas.

I could also point out that I have the same running battle with the Department of Labor which uses a totally incorrect methodology to estimate the number of unemployed and because we underestimate the number of unemployed, the number of minorities, we are getting shorted on all of those formulas.

In fairness I must say the Bureau of Census denies this and the Department of Labor denies this and we are in that battle which will probably be resolved one of these days in court, or hopefully by the 1980 census in that one area.

Donning my official hat I'm going to tell you that as moderator of this next session, I'm going to take copious mental notes on what the two distinguished panelists will say today.

An Introduction to the Community Development Litigation and Its Impact

by George D. Brown
Professor
Boston College Law School

That there has been a dramatic increase in grant litigation over the past decade is a proposition which is not disputed, and a subject which has been treated extensively in the legal literature and elsewhere.[1] And it is fair to say, I think, that there has also arisen a certain uneasiness on the part of many students of the federal grant-in-aid system at the sudden arrival in force of lawyers on the scene.

Realistically, nonlawyers must not only recognize the existence of this phenomenon, but also try to understand it. If anything, the need for understanding is even greater on the lawyers' side; lawyers and judges need to appreciate the dynamics of the grant system far better than they do at present. As exhibit A, one might cite the initial decision of the fifth circuit in *Goolsby* v. *Blumenthal*[2]. Initially, a 2-to-1 panel ruled that General Revenue Sharing funds were just like any other federal grant, and therefore the expenditures of them were subject to the *Uniform Relocation Assistance Act.*[3] Now, if a court doesn't see the difference between revenue sharing on the one hand, and, on the other hand, the categorical grants which dominated the system when the *Relocation Act* was enacted, we should not be surprised when it renders a questionable decision. What is needed is an ongoing dialogue—a bridge, if you will—between the lawyers and the experts in other disciplines who are working on grant issues. The ACIR is in an ideal position to provide this bridge. Today's conference is, one hopes, an important first step.

> **"Those disputes which ultimately end up in court reflect political disputes in the society at large."**

The community development (CD) litigation is an interesting illustration of this point. Let me begin with a quote from an "Advocacy Guide" to the Community Development Block Grant Program put out by a major legal services group.

> Struggles over the use of CDBG funds do not simply involve interpretations of the HCDA, but are part of much broader conflicts over the control and use of resources, and over broad public policy issues.[4]

As the quote suggests, those disputes which ultimately end up in court reflect political disputes in the society at large. As the volume of grant funds has expanded, and as Congress has utilized the grant mechanism to create a panoply of new interests, it is hardly surprising that the number of grant lawsuits has likewise increased.

Before proceeding further I have to enter one disclaimer about any analysis of the CD cases. It is true that grant cases in general are hard to find in the published reports. This difficulty seems even greater in the CD area. Many of the cases are not reported officially, but are "semireported," that is, they can be found in the *Clearinghouse Review* or some other unofficial source.[5] Some of them are not reported anywhere but are passed on by word of mouth and memoranda among various networks in the CD field.[6]

Despite the difficulties of getting a fix on the overall volume of CD litigation it is apparent that it is substantial. I base this statement on the 17 cases which I have found in the *Federal Reporter* and *Federal Supplement,* the large number of semireported cases, and the large number of settlements that one reads about in the literature. Others have reached the same conclusion. Writing in 1976, Prof. James Kushner stated that "more legal challenges have been made in the first year of the HCDA than under the past decade of urban renewal and categorical grants."[7] More recently, the "Advocacy Guide" quoted earlier stated that "each year of the CDBG program has seen an increasing number of cases brought . . ."[8]

Let us take this volume of cases as a given, and ask ourselves the reason why. Why does this particular statute seem to engender so much litigation? The answer, I think, is to be found in the structure of the act itself. It invites controversy. Specifically, it invites challenges on the part of those within the community whose proposals did not get funded. The key lies in the change from a number of categorical grant programs to a single block grant. As The Brookings Institution points out, the range of eligible activities helped bring new groups into competition, and forced generalist local government officials to make specific choices.[9] Moreover, these choices were highly visible given the act's citizen participation mechanism.

Competition for funds has been intense. The city manager of Cambridge, MA, testified during renewal hearings about a program year in which he received $8 million worth of requests for $2.8 million in funds for which Cambridge was eligible.[10] The natural result of such a situation will be fierce struggle in the political arena, with an inevitable number of losers. As I suggested a moment ago, the typical American phenomenon will then ensue: people who have lost in that arena will transfer the battle to the judicial arena, in this case the federal court.

With some exceptions courts tend to view the CD cases not as presenting unique questions of "grant law," but as forms of the administrative law litigation to which they have become accustomed over the last half century. For example, the doctrine of scope of review is applied interchangeably in both grant cases and the more typical regulatory context.[12] In fact, the leading case on scope of review—*Citizens to Preserve Overton Park v. Volpe*[13]—involved a third-party challenge to a transportation grant. I would like to focus on CD litigation of a particular sort; suits by third parties who claim that they should benefit under the act but do not receive the appropriate quantum of benefits under their community's application.[14] These suits are usually brought against HUD to enjoin approval of the application.

The doctrine which has cropped up most frequently in these cases has been that of standing. Governmental defendents have consistently argued that the plaintiffs lacked standing, that is, that there was not a genuine adversary relationship between the would be challengers on the one hand and the defendant on the other hand. The fact that standing has arisen so frequently in this area of litigation is by no means unique. Prof. Richard

Cappalli estimates that the issue surfaces in almost one-half of all grant cases.[15] In the CD context, at least, the party challenging standing almost always loses.[16]

The courts have, if anything, been somewhat uncritical in assuming that plaintiffs had suffered some harm and did stand to benefit if the court enjoined a community's application in its present form. An example is *Philadelphia Welfare Rights Organization v. Embry*[17] a challenge to an application based on insufficient benefit to low income persons under that portion which financed housing rehabilitation. The court stated that "reallocation of Title I funds to benefit low income people *will* directly result in an increase in the availability of housing units for low income people,"[18] without considering whether any such reallocation would result from its decree. Unless they wish to abandon traditional standing inquiries, courts would seem to be under a duty to consider whether the plaintiffs really will be any better off if they secure the relief which they seek. Perhaps their reluctance to engage in an extensive standing inquiry stems from a concern that strict application of Supreme Court cases such as *Simon v. Eastern Kentucky Welfare Rights Organization.*[19] and *Warth v. Seldin*[20] would lead to conclusions that no one had standing to challenge CD applications.[21]

Of course, that inquiry can be exceedingly complex. Recently, minority residents of Boston sued HUD to enjoin the award of a UDAG grant to that city. They alleged that Boston did not meet the statutory criteria of having a demonstrable record of achievement in improving conditions for racial minorities.[22] The district judge found that they lacked standing. He reasoned that if plaintiffs won, Boston would get nothing, and that, apart from spite, that result did not represent any benefit to them. The first circuit court of appeals reinstated the complaint, at least temporarily, although it too found the standing issue extremely difficult.[23] The court reasoned that some plaintiffs had been harmed by discriminatory housing conditions in Boston, and that if the projects to be funded were administered in nondiscriminatory fashion, that might well help the plaintiffs by enhancing their housing opportunities.[24] The principal problem with this analysis is that very little of the project funds were to be allocated to housing, and what housing there was would not seem to help plaintiffs find low cost shelter in an integrated neighborhood.[35]

The court might have found standing if it had been willing to take an expansive view of the statutory benefit analysis utilized in some cases.[26] Congress might be viewed as having granted to plaintiffs an interest in having UDAG funds awarded only to communities which had actively worked, or which would work, to increase opportunities for minorities. The harm suffered is, thus, not the preexisting condition, but the award of funds in a manner which does nothing to alleviate it.[27]

Perhaps the source of much of the first circuit's difficulty is its apparent agreement with the second circuit's decision in the famous, some would say notorious, *Hartford* litigation.[28] In that case Hartford, and low income residents, sued in federal court to enjoin CD grants to a number of its suburbs on the ground that those communities were not correctly preparing the housing assistance plan which the act requires as a condition of receiving funds. In particular, Hartford asserted that they had failed to plan adequately for low and moderate income residents who might be "expected to reside" within their borders. Ultimately, the challenge was rejected on the ground that both Hartford and the low income residents lacked standing to bring the action. A majority of the second circuit emphasized the fact that if the suburbs conformed their plans to the act's requirements, Hartford would therefore get nothing. What the court failed to appreciate however is that *Congress* had declared that planning by suburbs to alleviate the municipal overburden of center cities such as Hartford would, in effect, lead to better conditions both for those communities themselves and for low and moderate income residents who might wish to move to suburban locations. This reasoning was adopted in a Michigan federal district court opinion—*Coalition for Block Grant Compliance v. HUD.*[29] That case relied on the statutory benefit analysis, and rejected the *Hartford* rationale.

It is possible that circumstances will arise in which third parties wish to sue the grantee directly, rather than suing HUD. A somewhat extreme example of this configuration is *Angell v. Zinsser.*[30] In that case a group of residents are attempting to enjoin their town's *withdrawal* from the program. More frequent might be cases in which plaintiffs seek to enjoin expenditure of the funds until their own projects are included in the grantee's overall program.

Such lawsuits are liable to bring the plaintiffs face to face with the doctrine of "implied rights of action" under federal statutes. This issue arises when a Congressional enactment creates a duty on the part of individuals (or governments) to be enforced by a federal regulatory agency, but does not provide for suit by other individuals who may suffer harm as a result of a breach of that duty. The question then is posed whether a right of action—suit by such aggrieved individuals—can be derived or "implied" from the statute. Although the Supreme Court has recently found in favor of a plaintiff invoking the implied right of action doctrine in the grant context,[31] it has also suggested that it will utilize a much more restrictive approach in the future.[32]

As of this writing there is the additional possibility that some grant suits of the nature under discussion can also be brought under Section 1983 of Title 42 of the United States Code which provides in part that "every person who, under color of any statute...of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."[33]

To conclude, what has been the impact of the CD cases? At first glance they appear to represent overwhelming victories for the government side, since virtually every one has been decided in the defendant's favor. Nonetheless, plaintiffs' lawyers claim that the cases have had a tremendous beneficial impact on the low and moderate income persons whom they represent. They emphasize the extensive leverage which the ability to bring suit gives in overall political bargaining, as well as the possibility of settlements advantageous to their position. Let me quote again from the "Advocacy Guide": "Despite the lack of favorable case precedent, the cases have had significant favorable impact. Many cases have resulted in court settlements which greatly altered local policies and practices. Even the judicially unsuccessful cases have resulted in local programs being changed in the ways sought by plaintiffs. Other cases were mooted after the city made the sought after changes. Moreover, the symbolic effect of certain cases, like *Hartford v. Hills,* has altered HUD and local program behavior."[34]

Whatever one thinks of the effect or desirability of this litigation, I am certain that the phenomenon is highly upsetting to advocates of the "New Federalism." As you recall, President Nixon's original goal in this area was a form of "special revenue sharing," which would get the federal administrative agencies completely out of the picture of influencing local priorities. As I read the CD cases, what emerges is not only an enhanced role for the agencies, but a dramatic entry of the federal courts into the heart of local government law. Regardless of one's position on the matter, it is surely an interesting area of federal grant law at work; and I think that we shall see more, rather than less, of it as the years progress.

FOOTNOTES

[1] E.g., R. Cappalli, *Rights and Remedies Under Federal Grants* 5-7 (1979); F. Michelman and T. Sandalow, *Government In Urban Areas,* Supplement 275 (1972).

[2] 581 F.2d 456 (5th Cir 1978), *rev'd en banc,* 590 F. 2d 1369 (5th Cir. 1979), *Cert. denied,* 100 S. Ct. 462 (1979).

[3] 42 U.S.C.A. §4601 (1977).

[4] CDBG Training Advisory Comm., "An Advocacy Guide to the Community Development Block Grant Program," 12 *Clearinghouse Review* 601, 641 (supplement 1979).

[5] *E.g., NAACP, Boston Branch v. Harris,* 12 Clearinghouse Rev. 915 (D. Mass.), *rev'd,* 607 F.2d 514 (1st Cir. 1979).

[6] See *Advocacy Guide, supra* note 4, at 675-77.

[7] Kushner, "Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974," 11 *Urban Law Annual* 37,98 (1976).

[8] *Advocacy Guide, supra* note 4, at 663.

[9] P. Dommell, R. Nathan, S. Liebschutz, and M. Wrightson, *Decentralizing Community Development,* 198-99 (1978).

[10] *Housing and Community Development Act of 1977, Hearings Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs,* 95th Cong., 1st Sess. 366-67 (1977) (statement of James L. Sullivan).

[11] *City of Hartford v. Towns of Glastonbury,* 561 F.2d 1032, 1053 (2d Cir. 1977) (Kaufman, C.J., concurring).

[12] See *e.g., NAACP, Santa Rosa—Sonoma County Branch v. Hills* 412 F. Supp. 102, 108 (N.D. Cal. 1976).

[13] 410 U.S. 402 (1971).

[14] *E.g., Broaden v. Harris,* 451 F. Supp. 1215 (W.D. Pa. 1978); *Philadelphia Welfare Rights Org. v. Embry,* 438 F. Supp. 434 (E.D. Pa. 1977); *NAACP, Santa Rosa-Sonoma County Branch v. Hills* 412 F. Supp. 102 (N.D. Cal. 1976); *Knoxville Progressive Christian Coalition v. Testerman,* 404 F. Supp. 783 (F.D. Tenn. 1975).

[15] Cappalli, *supra,* note 1 at 109.

[16] Of the eight reported cases in which standing is considered, it was ultimately the basis of dismissal in only one instance: the *Hartford* litigation. The First Circuit has left open the possibility of an eventual standing dismissal in *NAACP, Boston*

Branch v. Harris, 607 F. 2d 514, 526 (1st Cir. 1979). It should be noted that the incidence of standing questions in eight out of 17 reported cases bears out Prof. Cappalli's estimate.

[17] 438 F. Supp. 434 (E.D. Pa. 1977).

[18] *Id.* at 438 (emphasis added).

[19] 426 U.S. 26 (1976).

[20] 422 U.S. 490 (1975).

[21] *See Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783, 787 (E.D. Tenn. 1975).

[22] Section 119(b) of the act provides, in part, that "Urban development action grants shall be made only to cities and urban countries that have, in the determination of the Secretary, demonstrated results in providing housing for persons of low-and moderate-income and in providing equal opportunity in housing and employment for low and moderate income persons and members of minority groups."

[23] *NAACP, Boston Branch v. Harris*, 607 F.2d 514 (1st Cir. 1979).

[24] *Id.* at 525-26.

[25] The funds requested were primarily for economic and commercial development.

[26] *Cf., Traficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

[27] *See City of Hartford v. Towns of Glastonbury*, 561 F. 2d 1032, 1057 (2d Cir. 1977) (dissenting opinion).

[28] *City of Hartford v. Towns of Glastonbury*, 561 F. 2d 1032 (2d Cir. 1977) *Cert. denied*, 434 U.S. 1034 (1978).

[29] 450 F. Supp. 43 (E.D. Mich. 1978).

[30] 473 F. Supp. 488 (D. Conn. 1979).

[31] *Cannon v. Univ. of Chicago*, 99 S. Ct. 1946 (1979).

[32] *Transamerica Mortgage Advisers, Inc. v. Lewis*, 100 S. Ct. 242 (1979); *Touche Ross and Co. v. Redington*, 99 S. Ct. 2479 (1979); *see Cannon v. Univ. of Chicago*, 99 S. Ct. 1946, 1968 (1979) (Rehnquist and Stewart, JJ., concurring). The courts have, somewhat automatically, transferred the concept of implied right (or cause) of action from the regulatory context in which it originated. *See*, Cappalli, *supra* note 1, at 115-16. There may be important differences which caution against such an approach. For example, grant statutes do not, by themselves, establish binding norms of conduct. (Many grant conditions would, in fact, be beyond the power of Congress to enact through coercive legislation). It is only when the grant is accepted that the conditions became binding on the grantee. Thus a third party beneficiary analysis might be more appropriate than an implied right of action inquiry. However, grant lawyers differe sharply over whether contractural analyses are accurate or helpful in the grant context. *Compare* Cappalli, *supra* note 1 at 80-93 (grants not contracts) *with* Brown, "Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs," 28. *American University Law Review* 279, 296-97 (1979) (contractual analysis of welfare litigation).

[33] The argument is that since grant conditions are "laws" of the United States, section 1983 provides an express right of action. *See Tongol v. Usery*, 601 F. 2d 1091, 1099-1100 (9th Cir. 1979). The Supreme Court appears to have accepted this position in *Maine v. Thiboutot*, 100 S.Ct. 2502 (1980).

[34] *Advocacy Guide, supra* note 4, at 663.

Federal Grant Litigation Involving Law Enforcement Assistance Administration

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With the increasing number and complexity of federal grant programs over the last decade and a half, there has been a concomitant growing involvement of the federal courts in resolving disputes among grantees, granting agencies, and third parties. Grant law is still in its early stages of development but is one of the fastest growing bodies of federal law.

The Omnibus Crime Control and Safe Streets Act ("the Act"), originally enacted in 1968, and amended in 1970, 1973, 1974, and 1976, (major amendments are also expected in late 1979) established one of the major federal grant agencies, the Law Enforcement Assistance Administration (LEAA). LEAA makes block entitlement grants to state governments and discretionary grants to state and local governments and nonprofit institutions with the purpose of improving the efficiency and overall quality of the criminal and juvenile justice systems.

Like those of all federal agencies, LEAA's programs are subject to a panoply of statutes and regulations including two authorizing acts, the *Civil Rights Acts,* the *National Environmental Policy Act,* and the *Administrative Procedures Act,* among others. In addition, the programs are subject to a large body of judge-made law.

The paper will discuss some highlights of LEAA's involvement in litigation and how that litigation has affected LEAA's progress. Litigation involving federal grant programs usually only touches upon small portions of an agency's authorizing legislation. More often, the lawsuits have their origin in other federal legislation or Constitutional clauses affecting the federal grant program. The cases which go to final court decisions represent only a small percentage of all cases filed against an agency. For these reasons, the reported cases will rarely shed light on the major goals or the major programmatic issues involving a specific federal agency's assistance program. An agency's administrative hearing and rulemaking proceedings are more instructive in this regard. The chief informational value of an agency's litigation lies more in its contribution to the overall knowledge we possess on the way in which our government assistance programs operate. Combined and analyzed with all litigation in the federal assistance arena, the information is most useful.

CIVIL RIGHTS LITIGATION

Section 518(c) of the *Omnibus Crime Control and Safe Streets Act of 1968*, as amended, provides that:

> No person in any state shall on the grounds of race, color, religion, national origin, or sex be excluded from participating in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any program or activity funded in whole or in part with funds made available under this title.[1]

LEAA has frequently become involved in the enforcement of that section. When LEAA, through its own investigation, or through notice of a finding by a federal court (other than in a suit brought by the Attorney General), a state court, or a state or federal administrative agency, determines that a state or local governmental grantee has engaged in a "pattern or practice" of discrimination, it notifies the chief state and local executives of the jurisdictions in which the discrimination has occurred and requests that they secure compliance with the law. If compliance is not secured and an administrative law judge has not determined that the grantee will probably prevail on the merits, LEAA suspends funding of the grantee. The suspension may be lifted by the execution of a compliance agreement, compliance with a federal or state court order covering all matters raised by LEAA, or a determination by an administrative law judge that the grantee is in compliance.[2]

When the Attorney General files suit against a grantee alleging a pattern or practice of discrimination in violation of the LEAA statute, LEAA must suspend funding of the grantee after 45 days unless within that period the United States or the grantee has obtained a court order to the contrary.[3]

The term "program or activity" in Section 518(c)(1) of the LEAA statute, *supra*, means the operations of the agency or unit of government receiving or substantially benefitting from LEAA dollars. That is, LEAA may generally investigate discrimination in any aspect of the grantee's operation, not just in the particular project it is financing. LEAA regulations so interpret the statute, and that interpretation has been consistently upheld by the federal courts.[4]

In civil rights suits brought by the Attorney General under the Act, the standard of proof has been held to be the same as that in suits under Title VII of the *Civil Rights Act of 1964*.[5] In other words, the Attorney General does not have to prove the existence of an intent to discriminate. Rather, he need only prove that the practice engaged in has had a discriminatory impact.

Pending the outcome of such civil rights suits, the grantee is always concerned with the prospect of having its federal aid suspended. In most cases, the grantee will seek an injunction against the suspension of funding in federal district court. All courts have applied essentially the same standard for determining whether or not to grant the requested relief, which is the standard normally applied in granting or denying preliminary relief.[6] The courts examine the petitioning party's likelihood of success on the merits of the case, the immediacy and intensity of any threat of irreparable injury to the petitioning party, the balance of the hardships that each party may suffer, and the public interest.

Consideration of those factors has led to a denial of the defendant's request for injunctive relief in a number of cases.[7] In most cases, the courts have granted the injunction.[8] It should be noted that in the greatest number of the cases where an order for an injunction was entered, it was done upon stipulation by the parties.[9] The United States will generally agree to an injunction where it believes there is a reasonable likelihood that the matters in dispute may be resolved voluntarily.

APPLICATION OF NEPA

The *National Environmental Policy Act* (NEPA) requires the preparation of an "Environmental Impact Statement" (EIS) for any major federal action that will affect the quality of the human environment. NEPA has been held to apply to projects funded by LEAA in *Ely v. Velde.*[10] In *Ely,* residents of Green Springs, VA, challenged the LEAA-assisted construction of a state penal institution in Green Springs, alleging that LEAA had violated NEPA by failing to prepare an EIS. After the fourth circuit court of appeals ruled that under the circumstances of the case an EIS was required, the Commonwealth of Virginia attempted to go forward with construction by using LEAA funds for another purpose and spending its own money for the penal center. In "Ely II"[11] the fourth circuit ruled that the Commonwealth could not so subvert the intended effect of NEPA. The decision was consistent with the general principle of grant law that a grantee may not evade the terms and conditions of a grant (whether in the form of statute, regulation, or grant agreement) by diverting funds originally granted for a project that would violate those terms and conditions to another project, and using its own funds for the offensive project.[12]

NEPA has been held to be very far-reaching in cases involving activities of other federal agencies. It may be assumed that it will also be broadly construed in its application to LEAA programs. NEPA has been held to require that the EIS contain full disclosure "of all known possible environmental consequences of proposed agency action."[13] The granting agency must consider not only the project's potential impact on the immediate area of the project site, but the potential impact on any other areas that might be affected as well.[14]

There are limits to the scope of NEPA, however, as demonstrated in *Ferguson v. Law Enforcement Assistance Administration.*[15] In that case, residents of Mecklenburg County, NC, challenged LEAA's granting of $105,000 to Mecklenburg County and the City of Charlotte to fund the operations of undercover drug enforcement agents. The plaintiffs alleged that the operations of the undercover agents would have an adverse effect on the social environment of the community by "increasing the risk of illegal entry of homes, and illegal search, seizure and entrapment of citizens," *inter alia.* In a *per curiam* affirmance of the district court's decision, the fourth circuit court of appeals held that the grant was not a "major federal action" and that it did not have the potential of adversely affecting the "human environment," as the term was used in NEPA.

> **"LEAA funds are by no means unlimited, so there will always be a number of disappointed grant applicants."**

While third-parties often are able to challenge an LEAA grant on NEPA grounds in court, judicial review of an LEAA decision not to prepare an EIS is limited. In *Faircrest Site Opposition Committee v. Levi,*[16] an association of property owners sought to prevent the construction of a juvenile detention center by claiming that LEAA had unlawfully failed to prepare an EIS for the project. The court held that the standard of judicial review of LEAA's decision not to prepare an EIS was the standard of the *Administrative Procedures Act* (APA). Under that standard, the courts must uphold the agency decision, unless there is less than substantial evidence to support it, or the agency action was arbitrary, capricious, or an abuse of discretion. Thus, primary responsibility for the enforcement of NEPA rests with the administrative agencies. Other courts have also applied the APA standard of review in reviewing decisions of other agencies under NEPA.[17]

APPEALS OF DISAPPOINTED GRANT APPLICANTS

LEAA funds are by no means unlimited, so there will always be a number of disappointed grant applicants. Units of government and nonprofit institutions whose applications for funding have been denied may feel that the criteria used in the award process was irrational or unfair or that the selection procedure was in some manner improper. Under Section 510(b) of the Act, applicants who have been funded or received less money than they deem appropriate, and grantees who have had their funding terminated are entitled to an administrative hearing to challenge LEAA's action. Following the hearing and issuance of the Administration's findings and determinations, a dissatisfied applicant or grantee may appeal to the federal court of appeals for the circuit in which the applicant or grantee is located, in accord with Section 511 of the Act. The court of appeals must uphold LEAA's decision if it is supported by substantial evidence based on the entire administrative record, and it is not determined to be arbitrary, capricious, or an abuse of discretion.

In the case of *Massachusetts Department of Correction v. Law Enforcement Assistance Administration,*[18] an applicant had been denied funding under an LEAA discretionary grant program entitled, "Corrections Training Program." LEAA had received 18 applications under the program, and assembled a panel of experts (including federal experts not connected with LEAA) to review the applications and recommend those that they thought should be funded. The panel recommended awarding funds to two of the applicants, neither of which was the Massachusetts Department of Correction (MDOC). MDOC was notified that its application had been denied for four reasons:

- the application did not reflect coordination with the Massachusetts Criminal Justice Training Council;
- the training methodologies to be employed were not innovative;
- the approach of the plan would be more appropriately funded by block grant funds; and
- MDOC had already received federal corrections funding for three years.

MDOC promptly requested a hearing on the denial.

The hearing examiner found that none of the four reasons given by the review panel for denial of the application was supported by substantial evidence and that the panel had failed to adhere to LEAA internal guidelines in its selection process. Based on those findings, he recommended that MDOC's application be reviewed once more. The Administrator of LEAA upheld the denial over the hearing examiner's recommendation, finding that LEAA was not bound by its internal guidelines, and that even if it were, the procedure used in the review of the applications was fair, and that at least there was substantial evidence in the record that the Massachusetts proposal was not innovative. Exercising its statutory right, MDOC appealed the Administrator's decision to the first circuit court of appeals.

The first circuit upheld the Administrator's determination. The court found that there was substantial evidence to support the Administrator's reason for denial, and that all applicants had been informed of the innovation criterion prior to applying. It did not deem significant the fact that of the four reasons given by the review panel for rejection, only one was used by the Administrator to support his determination. What was important, said the court, was whether the Administrator's decision was supported by substantial evidence, not whether the recommendation of the review panel was so supported.

Furthermore, the court held that LEAA was not bound by internal procedural guidelines not published in the *Federal Register* or otherwise communicated to the public. There could be alleged no public reliance on such guidelines. Finally, the court found that while the precise course of the panel's proceedings could not be determined from the record with any degree of exactitude, they were not conducted in such a way as to prejudice MDOC's application.

The case of Champaign County, IL presented more complicated questions. Champaign County had applied to LEAA for a discretionary grant for the construction of a new correctional-court complex. The Administrator indicated to officials of the county that an amount of money considerably less than the amount requested would be made available assuming the county complied with applicable guidelines and requirements and submitted an application geared to the amount made available. Subsequently, the Administrator informed Champaign County officials that an additional amount of money would be available. Champaign County assumed that a new application was not required and further assumed that LEAA, in making funds "available," actually awarded funds.

When informed that funds would be returned to Washington unless a letter of intent was received immediately, Champaign County submitted a letter indicating that the bulk of funding for the project would be supplied by a county referendum. The referendum was defeated and the county never appropriated any matching funds for the program. The Administrator and Deputy Administrator resigned at about this time and an Acting Administrator was serving in office. The county requested an extension to redesign the facility and devise new methods for funding the project. The request was denied by the division head and the grant application was rejected.

A hearing was held to review what LEAA termed the denial of an application and what Champaign County termed the termination of a grant already awarded. At the hearing, Champaign County argued that under Section 308 of the Act, the application was approved as a matter of law since it had not been denied within 90 days of submission; that in any event, the Administrator had approved the application and communicated his approval to Champaign County, thereby binding the government; and that the Acting Administrator had no authority to take any action with respect to the grant, since he had not been appointed by the president with the advice and consent of the Senate, and was serving in violation of the *Vacancy Act.*[19] LEAA took the position that the 90-day rule of Section 308 of the Act only applies to applications for block grants; that there cannot be an award without official documentation (31 U.S.C. 200), and that the assistant administrator who rejected the grant application had been delegated the authority to deny applications by the original Administrator, and that delegation survived the original Administrator's resignation.

The hearing examiner agreed with LEAA that the 90-day rule of Section 308 of the Act had no application to discretionary grants. Thus, it could not be said that an award had been made by operation of law. The examiner rejected LEAA's argument that a formal grant award document was necessary to bind the government. But he determined that Champaign County, instead of accepting the award, altered its plans for construction and funding thereof, and thus, was required to submit a revised application. The Administration, having waited a reasonable period of time for the filing of a new application and having received none, properly deobligated the funds. Turning to the issue of the authority of the Acting Administrator, the hearing examiner determined that the application was denied by a properly delegated official.

Pursuant to the hearing examiner's recommendation, the LEAA Administrator (this one appointed by the President) upheld the denial. He determined, however, that an award document was necessary to bind the government. The Administrator's decision was upheld by the seventh circuit in *Champaign County v. United States Law Enforcement Assistance Administration.*[20] The court held that the 90-day rule did not apply to discretionary grants; that under 31 U.S.C. 200 and LEAA guidelines, LEAA funds could not be obligated without documentary evidence of a grant agreement; that the letter denying the request for an extension of the application period was adequate notice of rejection under the *Crime Control Act;* and that the authority of the division head to deny the application, delegated by a former Administrator, survived the resignation of that Administrator. The court did not find it necessary to reach the issue of the acting Administrator's authority.

THIRD-PARTY CHALLENGES TO LEGALITY OF LEAA PROGRAMS

On several occasions, third-parties have brought actions challenging the authority of LEAA to fund particular programs. Not infrequently, those third-parties are persons prosecuted or facing prosecution as a result of the effectiveness of an LEAA program.

An example was litigation involving the Pennsylvania Special Prosecutor's Office. In 1974, reacting to findings of a Pennsylvania investigative grand jury and the Pennsylvania Crime Commission that official corruption existed in various places in Pennsylvania, the Pennsylvania Department of Justice applied for LEAA financial assistance for the establishment of an office of the special prosecutor. LEAA funded the special prosecutor until 1976, when his operations became hamstrung by an act of the Pennsylvania General Assembly (discussed *infra*). A number of Philadelphia policemen, state officials, and private citizens, faced with prosecution for corruption and perjury, brought actions in state and federal courts to challenge the prosecutorial authority of the office, and the legality of its funding by LEAA. In *Gwinn v. Kane,*[21] the president of a milk company having been charged by the special prosecutor with perjury and false swearing in a grand jury proceeding, brought an action in *quo warranto* against the special prosecutor could not exist under Pennsylvania law. The court found authority for the office in The Administrative Code of 1929, which permits the attorney general of Pennsylvania to appoint deputies to intervene in local prosecutions in appropriate cases. The court considered irrelevant the allegation that under the LEAA grant the office was to engage in statewide prosecution since in the instant case it was prosecuting in a particular district where a judge and the attorney general deemed it necessary.

In *Hallman v. Phillips,*[22] several Philadelphia policemen (some of whom had been charged with corruption by the special prosecutor, others of whom were under investigation) sought an injunction against LEAA's funding of the special prosecutor. The plaintiffs alleged that the prosecutor's appointment as a deputy attorney general was invalid under Pennsylvania law, and in the alternative that he was carrying out his duties in a manner contrary to state law. The district court stayed the case until similar issues were decided in Pennsylvania suits such as *Gwinn v. Kane, supra.* After the Pennsylvania Supreme Court affirmed the *Gwinn* decision, the court lifted the stay, and considered the defendant's motion to dismiss. Because the plaintiffs were not challenging an exercise of the Congressional spending power, the court held that they did not have standing as taxpayers under *Flast v. Cohen,*[23] and subsequent Supreme Court decisions. The court did not expressly rule on whether the plaintiffs had standing as state criminal defendants or targets of state criminal investigations but held that they were not entitled to an injunction because the burden of defending a criminal prosecution did not constitute "irreparable injury."

None of the suits challenging the legality of the special prosecutor's office was successful. However, the very institution of the suits seriously hampered the special prosecutor's work. As discussed, *infra,* it finally took an act of the General Assembly to destroy the office completely.

More recently, several persons convicted of crimes in Texas courts brought actions challenging LEAA's "Sting" and "Career Criminal" programs. Under the former program, state or local law enforcement officers set up "fences" in order to catch thieves and persons trading in stolen goods. Under the latter, state prosecutors attach priority to prosecutions of repeat offenders and establish systems for the identification and rapid processing of those cases.

In *Brooks v. Dogin,*[24] a state prisoner seeks an injunction against LEAA's provision of funds to the Dallas Career Criminal Division. He alleges that in prosecutions of defendants processed through the Career Criminal program the state prosecutor preemptorily challenges all black prospective jury members. This, he argues, violates his and other criminal defendants' rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and *Civil Rights Act.*

In *Harper v. Dogin,*[25] a Texas prisoner convicted through a Sting operation seeks damages against the LEAA Administrator and an order enjoining LEAA from continuing to support such operations. The prisoner alleges that the Sting program is tantamount to organized entrapment, and contends that this violates citizens' rights under the Constitution and the *Civil Rights Act.*

As these and three similar cases are at the time of this writing before the District Court for the Northern District of Texas on motions to dismiss, it would not be appropriate to comment on their merits. They are provided as further examples of efforts of third parties to hamper or stop LEAA funded state or local operations.

CONFLICTS BETWEEN STATE LAWS AND THE CRIME CONTROL ACT

It is a well established principle of American federalism that where a state law is in direct conflict with a federal law, the federal law governs. Article VI of the Constitution provides that federal law is the "Supreme Law of the Land." Yet it is often difficult to determine whether or not two laws do in fact conflict. This is as true in the area of grant law as it is in any other area of the law.

From time to time, a state legislature will enact a law providing that no funds may be disbursed from the state treasury, including funds received through grants from the federal government, without an express appropriation by the legislature. Since the LEAA statute and regulations promulgated thereunder provide that the executive branch of the state government is to control funds granted by LEAA, it is arguable that such state laws are in conflict with federal law. On the other hand, such state laws do not necessarily deny the executive control to the funding authority controls of the legislature. Where the legislature actually exercises that operation, the case is stronger that the laws conflict. It might also be argued that such an act of the legislature violates the "Contracts Clause" of Article I of the Constitution.

Two cases involving this problem merit discussion. In *People ex rel. Kirk v. Lindberg,*[26] *modified on denial of rehearing,*[27] the director of the Illinois Department of Local Government Affairs sought a writ of mandamus ordering the state comptroller to honor a voucher for federal funds in the state treasury. The comptroller had refused to pay the voucher because no appropriation had been made of the funds requested, and he believed that the Illinois Constitution and a state statute prohibited disbursement of the funds. Section 2(b) of Article VII of the Illinois Constitution provides that, "The General Assembly by law shall make appropriations for all expenditures of public funds by the state." The statute in question made appropriations and also provided that federal funds received above the amount appropriated could be expended only upon additional appropriation by the General Assembly, except that grants-in-aid for nonstate agencies could be expended absent such appropriations. The Illinois Supreme Court, in granting the writ, held that the statute was unconstitutional because the Illinois Constitution provided that appropriations bills may only contain appropriations, and that despite the Constitutional prohibition of expenditure of funds without appropriations, some funds were so expended each year and such expenditures had long been upheld in the Illinois courts. The court never reached the issue of possible conflict with state law.

The case of *Shapp v. Sloan,*[28] involved the Pennsylvania Office of the Special Prosecutor. In 1976, the Pennsylvania General Assembly passed Act 117 which included the following provision:

> The state treasurer is hereby specifically prohibited from issuing any warrant for requisitioned funds which were derived, in whole or in part, from federal funds unless such funds have been specifically appropriated by an act of the general assembly.

In the appropriations act that year, Act 117-A, no provision was made for the special prosecutor's office. The commonwealth treasurer refused to issue a warrant for funds for the office upon requisition by the Governor's Justice Commission (the SPA). The Governor brought suit challenging the validity of Act 117 and the appropriations act under the Pennsylvania and United States Constitutions. The Governor argued that the exercise of legislative control over moneys granted by the federal government for use by the state executive branch violated the doctrine of separation of powers. The Pennsylvania supreme court held that there was no valid legal basis for such an argument. The Pennsylvania Constitution gave appropriation power to the General Assembly, not to the Governor. The federal money, said the court, was granted to the commonwealth, not to any particular branch of the commonwealth government. The ratio of federal money to state money expended by the commonwealth was at that time 1 to 3. If federal funds should reach 100% of the state budget and the executive branch controlled these funds, there would be little need for a state legislature. It would be executive assumption of the appropriations power that would violate the doctrine of separation of powers.

Addressing the Governor's argument that Act 117 violated the Supremacy Clause of the United States Constitution, the court noted that nowhere in the *Crime Control Act* was it specifically provided that LEAA money was to be granted to the state executive. It also pointed out that the Advisory Commission on Intergovernmental Relations (ACIR) had recommended that state legislatures assume greater control over the use of federal funds. Consequently, there was therefore not the "clear and direct conflict" necessary to invalidate a state law under the Supremacy Clause.

The Governor also argued that the act of the general assembly was a violation of the Contracts Clause of the United States Constitution. The court held that grants from the federal government to states were not contracts, but were rather better characterized as "conditional gifts." Even if grants were considered contracts, said the court, a state "is not prohibited from exercising its sovereign power for legitimate motives even if in so doing it interferes with existing contracts." In exercising its appropriations power, the general assembly was acting for legitimate motives. Thus, the Contracts Clause was not violated.

The Pennsylvania Supreme Court thus refused to overturn Act 117 or Act 117-A. The Governor's appeal to the United States Supreme Court was dismissed in *Thornburgh v. Casey.*[29]

CONCLUSION

LEAA's ten-year history reflects that people and organizations affected by federal assistance legislation rarely resort to the federal courts in ways which substantially affect the operations of those programs. Intergovernmental conflicts among local, state, or federal agencies more often present issues which can be addressed by a federal court.

Less often, private citizens' suits are able to obtain review. Occasionally an agency's legislation is the vehicle for a substantial intergovernmental issue with potential impact on our system of government or on the relationships among governmental components.

FOOTNOTES

[1] Similar language appears in Title VI of the *Civil Rights Act of 1964*, which is, of course, applicable to LEAA's programs.

[2] 42 U.S.C. Section 3766(c)(2).

[3] 42 U.S.C. Section 3766(c)(2)(E).

[4] 28 C.F.R. 42.202(g). See, *e.g., United States v. Commonwealth of Virginia*, No. 76-0623-R (E.D. Va., filed April 8, 1977).

[5] *United States v. Commonwealth of Virginia*, 454 F. Supp. 1077 (E.D. Va. 1978).

[6] *United States v. Commonwealth of Virginia*, 569 F. 2d 1300 (4th Cir. 1978); *United States v. County of Fairfax*, No. 78-862-A (E.D. Va., filed Jan. 30, 1979); *United States v. County of Milwaukee*. 449 F. Supp. 949 (E.D. Wis. 1978); *Capel v. Lamb*, No. LV 77-118, RDF (D. Nev., filed August 2, 1978).

[7] *United States v. City of Los Angeles*, 595 F. 2d 1386 (9th Cir. 1979); *United States v. County of Milwaukee, supra; Capel v. Lamb, supra.*

[8] See, *e.g., United States v. County of Fairfax*, No. 78-862-A (E.D. Va., filed Jan. 30, 1979); *United States v. State of Illinois*, No. S-CIV-76-0158 (S.D. Ill., filed Feb. 24, 1978).

[9] See, *e.g., United States v. Jefferson County, Alabama*, No. 77-H-0683-5 (N.D. Ala., filed July 12, 1977); *United States v. County of Baltimore, Maryland*, No. H-78-836 (D. Md., filed June 15, 1978).

[10] 451 F. 2d 1130 (4th Cir. 1971) ("Ely I").

[11] *Ely v. Velde*, 497 F. 2d 252 (4th Cir. 1974).

[12] See, *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F. 2d 1013 (5th Cir. 1971).

[13] *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971) *dismissed*, 342 F. Supp. 1211 (E.D. Ark. 1972), *aff'd*, 470 F. 2d 289 (8th Cir. 1972).

[14] *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105 (D.N.H. 1975).

[15] No. 72-2192 (4th Cir., filed Jan. 30, 1973).

[16] 418 F. Supp. 1099 (N.D. Ohio 1976).

[17] See, *Silva v. Lynn*, 482 F. 2d 1282 (1st Cir. 1973); *Morningside Renewal Counsel Inc. v. U.S. Atomic Energy Commission*, 482 F. 2d 234 (2d Cir. 1973), *cert. denied*, 417 U.S. 951 (1974).

[18] No. 78-14[illegible]0 (1st Cir., filed Sept. 13, 1979).

[19] Champaign County made the same argument in a suit filed in District Court for the Eastern District of Illinois in which it sought, *inter alia*, an injunction against the acting Administrator's approval of grants and disbursement of federal money. *Champaign County, Illinois v. Gregg*, No. CV 78-0070-D (E.D. Ill.). The district court dismissed the suit.

[20] No. 78-2622 (7th Cir., filed Dec. 28, 1979).

[21] 19 Pa. Comwlth. 243, 339 A. 2d 838 (1975), *aff'd*, 465 Pa. 269, 348 A. 2d 900 (1975).

[22] 409 F. Supp. 423 (E.D. Pa. 1976).

[23] 392 U.S. 83 (1968).

[24] No. CA3-79-1143 F. (N.D. Tex.).

[25] No. CA3-79-1132-F. (N.D. Tex.).

[26] No. 46966 (Sup. Ct. Ill., filed Sept. 27, 1974).

[27] 59 Ill. 2d 38, 320 N.E. 2d 17 (1974).

[28] 480 Pa. 449, 391 A 2d 595 (1978).

[29] 440 U.S. 942 (1979).

Part IV

State and Local Governments In The Supreme Court of the United States

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As a lawyer who has taken part in many cases in the Supreme Court of the United States over the past 40 years, I have been asked to talk to you about preparation and presentation of cases in that unique forum. In recent years that Court has increasingly become the summit source of decisions affecting allocation of government power in our nation and its decisions are of vital concern to all governmental officials.

Our system of Constitutional federalism allocates governmental powers to the federal government and to states who often act through their local governments and the Supreme Court is the final power arbiter in our nation so all levels of government are constantly affected by its decisions. And as Mr. Justice Robert Jackson said: "The Supreme Court is final not because it is infallible, but it is infallible because it is always final."

I argued my first Supreme Court case against Mr. Justice Jackson (then, Solicitor General of the United States) in 1938. It was the case of *City of Atlanta v. Ickes,*[1] involving the Constitutional power of Congress under the *Bituminous Coal Act* to fix the prices at which states and cities purchased coal. Prior to the argument Secretary Ickes issued an exemption of states and cities from the act thus giving Atlanta a victory on jurisdictional grounds and avoiding the Constitutional issue.

From the time of that case until now I have represented states and cities in many cases before the Supreme Court, arguing a case there as recently as October 29, 1979. Perhaps the most notable to you of the cases we have been involved in was *Baker v. Carr,*[2] where we won the "one-man, one-vote" decision and *National League of Cities v. Usery,*[3] where we won a decision that the federal government could not fix wages and hours for state and local employees.

The flood of cases taken to our highest Court has now reached almost 5,000 per year. Of course, all but about 100 of these are refused review and are disposed of in about two words, *certiorari* denied or appeal dismissed.

The ones which are considered by the Court orally are thoroughly reviewed by briefs and oral argument because the Court considers that they raise important statutory or Constitutional questions it should decide. Selecting the 100 cases to be briefed and heard orally is a major task of the Court. The generally understood criterion is that if four Justices vote to hear a case it becomes one of the 100. The lawyers on each side generally have one-half hour to present their oral argument.

Prior to the oral argument the lawyers for each party must file the record of the case below and their briefs.

Before going further let me dispose of one subject I have been constantly asked to discuss.

The important role the Court plays in the lives of all Americans is so great as to bury in infamy the current book which attacks that Court. That Justices like lawyers and other humans disagree is nothing new. The authors of that volume have twisted the words and work of outstanding jurists into hyperboled squabbles so as to paint an uninformed and untrue picture of this great institution. But hurt it they cannot, because so great is the public esteem for the Court and so low the public esteem of the book's authors. The Court will be honored for performing its high governmental function long after the book is forgotten.

The worldwide importance of the Supreme Court is such that hundreds of tributes of admiration for it as an institution could be quoted. Their tremendous intellectual effort is constantly praised by experts in Constitutional law. I will confine myself to a few quotes beginning with that of Mr. Justice David Brewer of the Supreme Court who said in 1898: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism." And I refer to Canon One of the American Bar Association's former Canons of Professional Ethics which states in part:

> It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor.

We as a people may talk long and loud of our rights and liberties, but our rights are as nothing without a redress and protection in the courts. The great Chief Justice John Marshall so truly said: "The judicial department comes home in its effects to every man's fireside, it passes upon his property, his reputation, his life, his all."

That Justices are human no one could or would deny. As humans they make mistakes like all of us. Their robes do not transform them into supermen. That they differ, as do all humans, does not warrant attempts to degrade them personally.

There are no easy decisions before the Supreme Court. That they split 5 to 4 or 8 to 1 is not as important as the fact that they perform that high function which makes our system of government work. Recall the governmental paralysis under the Articles of Confederation due largely to the absence of an organ to decide great issues. We have that organ now.

I do not say the Supreme Court is perfect or its decisions always correct. No group of humans are, or can be, placed in such a position. But I agree with Sir Winston Churchill, who in the last great address of his career in 1957 to the American Bar Association at its convention banquet in London's historic Guildhall called the Supreme Court of the United States the "greatest court on earth." I had the honor as President of the American Bar Association of introducing Sir Winston. His exact words were:

> The Supreme Court of the United States is the greatest court in the world. It is the supremest of the supreme in the field of law. And the man who sits here with me, the Chief Justice of the United States, Earl Warren, will go down in history as the greatest human rights leader, not only of our generation, but of all generations. He has dared to interpret that great document which has its roots in our Magna Charta as meaning that all persons are equal and free.

Earl Warren there spoke of the fact that "the great principles of our Constitution were the refined wisdom of the great law givers of the ages written down for the first time as the guiding principles of a nation." He said the reason so few changes have been made in the Constitution as "our nation changed from a wilderness to the greatest industrial nation on Earth was that these principles were and are immutable—the wisdom of humankind, and the dreamed-of guiding stars of every woman, man and child on Earth, not just Americans."

In the debates of the Constitutional Convention, America's founding fathers did indeed envision a national tribunal, a Supreme Court, as the arbiter of power among states and the federal government in the new federal system of government.

In their defenses of the newly proposed Constitution in *The Federalist Papers,* both James Madison and Alexander Hamilton indicated that such a role was almost inevitable for the Court.

Madison argued that "some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact" that binds the states together as a nation.[4]

> Hamilton was just as emphatic in maintaining that there ought always to be a Constitutional method of giving efficacy to Constitutional provisions. . . . The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.[5]

Early in the Court's history, John Marshall asserted the Court's role as arbiter between the states and the federal government. In *McCulloch v. Maryland,*[6] he established the Supreme Court as "the ultimate power" in deciding all such questions.

Today, with nearly 200 years of experience under the Constitutional system of federalism, the role that Madison and Hamilton predicted for the Supreme Court has indeed been fulfilled. In recent years, the Court has increasingly become the summit source of decisions of local governments as well as those governing the federal and state governments.

In writing their defenses of the proposed Constitution in *The Federalist,* Madison and Hamilton saw the primary role of the Court as one of the "umpiring" disputes between conflicting state and federal laws. At that time, it was thought that the national tribunal would be necessary primarily to make sure that state law did not conflict with the federal Constitution and the laws enacted thereunder. In fact it was suggested by Pinkney of South Carolina at the convention that the Constitution provide that by law the federal Congress have power to nullify state laws it disagreed with, but the idea was rejected.

The role of "umpire" was left to the courts and in decision by decision it established the federal government over the states, whittling away little by little the Constitutional powers of the states.

Recently, however, the U.S. Supreme Court has revived the fundamental principles of "federalism" explicit in the Tenth Amendment, and the 100 references to the states throughout the United States Constitution, to also question federal laws which conflict with the traditional functions of state and local government. As a result, the Court must do its "umpiring" from several different vantage points on the playing field of federalism. The result has been an ever growing number of major decisions in recent years affecting municipal and state governments, some with positive effects, and some with obviously detrimental effects.

The impact of Supreme Court decisions upon municipal government is perhaps nowhere more dramatically illustrated than in the Court's recent land use decisions. The 1926 Supreme Court decision upholding local land use regulation, *Village of Euclid v. Ambler,*[7] was followed in the succeeding two years by four other local zoning cases.[8] From 1928 to 1974, a period of 46 years, the Court did not render a new decision in this area; it dismissed appeals or refused *certiorari* referring to these four cases as having settled the federal Constitutional law on this subject. Since 1974, however, the Court has decided nearly twice as many land use cases as it did in all its previous history.

Since 1974, the Court has ruled on such diverse topics as whether a municipality can control the location of adult movie theaters in a community,[9] whether a municipality's refusal to rezone a piece of property in order to permit the construction of multiple family housing for low and moderate income persons violated Constitutional rights,[10] and whether a municipality may write into its zoning laws provisions to prohibit nonrelated persons[11] or extended family members, such as grandparents, from living in the same household.[12]

The impact of recent Court decisions on municipal government is not limited to land use cases. In just the past few terms, the Court has ruled that municipal governments are, in many cases, subject as "persons" to liability under the federal antitrust acts.[13] A little over a year ago, the Court further expanded municipal liability by reversing an earlier decision and holding that municipalities are "persons" for purposes of liability under the *Civil Rights Act of 1871.*[14] The potential burden of the added liability imposed by these two decisions indicates how dramatically the Court can reshape the conduct of local government.

The Court has offered significant encouragement to municipalities in some areas, however. Its decision in *National League of Cities* to which I referred above is the touchstone for a reaffirmation of the important role of state and local government in the federal system, a role which for many years lay dormant. In striking down the extension of the federal wage and hour provisions in the *Fair Labor Standards Act* to state and local governments, the Court gave municipalities a major victory in their efforts to stem the ever-increasing tide of federal intrusion into local affairs.

A major theme of litigation under federal grants will be the extent to which the presence of federal money sanctions the use of grant conditions to achieve what the Court in *National League* forbade as direct regulation.

It is also worth noting that municipalities are not only involved in Supreme Court litigation which impacts on the conduct of local government, but also litigation which impacts on the private sector. Because of the application of Title VII of the *Civil Rights Act of 1964* to state and local government, employment discrimination litigation involving municipalities is of great interest to the private sector as well. A recent example of such a case was the Court's holding, in April 1978, that the City of Los Angeles' requirement that female employees make larger contributions to a pension fund than male employees, based on the fact that women, as a class, live longer than men, violated Title VII's sex discrimination provisions.[15]

And, of course, because of the judicial extension of the federal antitrust acts to municipalities, attorneys for municipal governments will also be adding to the body of antitrust law in the private sector.[16] We in my office are already working on several such cases.

> **"A major theme of litigation under federal grants will be the extent to which the presence of federal money sanctions the use of grant conditions to achieve what the Court in *National League* forbade as a direct regulation."**

Similarly, the Court's recent interpretations of the Fourth Amendment's Warrant Clause, in cases involving police[17] and fire[18] officials, are equally applicable to state and federal officials and their records, as well as newspapers.

I think that it is rather ironic that a court which has constantly emphasized that it is being overworked has recently opened the "floodgates" for litigation against municipalities in such decisions as those applying the antitrust acts and the *Civil Rights Act of 1871* liabilities to municipalities. These and other decisions seem to insure that municipalities will be among the chief litigants before the Court for years to come.

There are several guidelines one must keep in mind in preparing and arguing cases before the Court. The first is what I like to call the "Jackson Rule." That "rule" is that no petition or jurisdictional statement should exceed 25 pages. This rule is based on a statement by the late Mr. Justice Jackson in which he stated it is unreasonable to expect the Justices to read such a petition of more than 25 pages.

An example of the importance of good short *certiorari* petition writing was the experience of cities in *Baker v. Carr,*[19] the "one-man, one-vote" case. Prior to our successfully getting the Court to hear the case, 15 previous petitions trying to get reapportionment before the Court had failed on Mr. Justice Frankfurter's "political thicket" or "political question" grounds. We wrote a 25-page *certiorari* petition where others had written over 200 pages in some of the 15 cases.

When preparing the petition, the statement of the question or questions presented must be carefully drafted. They should be broad enough to raise the issues you wish to raise, but concise enough to maintain their "sex appeal."

An example of the problems that can develop when sufficient care is not taken with the question presented can be seen in the recent ruling in *Procunier v. Navarette,*[20] in which the majority ruled that state prison officials enjoy qualified immunity from an inmate's suit under 42 U.S.C. Section 1983, alleging interference with his outgoing mail, unless the officials knew or reasonably should have known that their actions would violate the inmate's Constitutional rights. Mr. Chief Justice Burger dissented because he said the Court's opinion departed from the usual practice of considering only the question upon which *certiorari* had been granted or questions "fairly comprised within" that question. Whereas the Court agreed to consider only one question, "whether negligent failure to mail certain of the prisoner's outgoing letters states a cause of action under section 1983," the Court decided a different question, "whether the prison officials are immune from section 1983 damages for negligent conduct." Mr. Justice Stevens also disagreed with the Court's approach. The disagreement among the Justices over exactly what was the question presented is an example of the kind of trouble one can get into without careful drafting.

While there is no limit to the number of pages a brief on the merits may contain, one should weigh each word, since the Justices are human and have eyes which hurt after reading long briefs, just like everyone else. How would you like to read the petitions, briefs, record and reply briefs in nearly 5,000 cases, no matter how good your eyes are?

To get the Court to hear oral argument in your case you must not only be concise; you must prove your case is important, unusual and above all within the Court's rather "narrowly" defined jurisdiction. But a win is a win so it counts just as much if you can win on the briefs without an argument.

Above all, the Court has highly technical rules and interpretations of those rules. And since the Court is the "end of the road," you are well advised to study these rules carefully as well as the Court's interpretations of them.

In preparation for oral argument before the Supreme Court, you should close yourself off as completely as possible from all other matters and concentrate many days on your preparation. Just as in drafting the petition and brief, every word in oral argument should be weighed carefully, and every effort should be made to make one's point briefly. Since the Court, by its questions, will often take up one-half to three-fourths of the time allotted to you, do not plan to use all the time set for your argument. If possible, one should present only one major point or principle confining your argument to the exact question the Court agreed to hear.

In spite of the fact that the Court takes up much of your time with questioning, it is possible to make your points in response to the Court's questions by being responsive to the questioning and then quickly moving on to make your point.

In oral argument, you must be keenly aware of the full logical extent to which your position can be taken, lest it be dissected and destroyed by the Court's questions or a showing by your opponent that your position leads to an absurb conclusion. Remember, those nine Justices do their questioning of lawyers day after day. They are experts at exposing the slightest weakness in your argument. Of course, this tactic of "reductio ad absurdum" can also be used by you to your advantage. The best way to be able to do this is to be armed with sufficient facts from the record with which to show fully the unreasonableness of your opponent's argument.

Indeed, stressing the factual impact of the arguments in the case is extremely important; it was the deciding factor in *National League of Cities v. Usery.* In *National League,* we made an extensive showing, by expert testimony and affidavits from city managers and other city officials, of the potentially disastrous impact the application of the *Fair Labor Standards Act's* wage and hour provisions would have on state and local government services, operations, and finances, not only in terms of dollars and cents, but in terms of service cutbacks and jobs lost as well.

An advocate before the Court is prohibited by the Court's rules from reading his argument. If the advocate reads his argument he will be stopped by the "Junior" Justice (another Court custom) and told not to read his argument. One can use an outline but reading an argument to the Court is absolutely prohibited.

It is also very unwise to read excerpts from prior decisions of the Court. Remember the Court knows more about its own decisions than do others as the briefs and arguments are replete with repeated references to them.

With the proper factual showing, it is possible to convince the Court of even the most difficult propositions. For example, in *Massachusetts v. United States,*[21] decided in March of this year, the Commonwealth of Massachusetts objected to the imposition of an annual federal aircraft registration tax on a police helicopter. Not only did the Court rule that the tax did not violate the implied immunity of state government from federal taxation, it concluded that even if the state's helicopter never used the Federal Aviation Administration's navigational services, for which the tax was imposed, the state had "benefited" from the services in the sense that they were available for all users. If the Court can be convinced that a tax on an airplane that has never left the ground can make the airways safe for everyone else, it can be convinced of any reasonable fact, with the proper showing in the record. The record is tremendously important and if you wander from it and begin "testifying" you can expect a quick reprimand from one of the Justices.

This is not to say that social science data cannot be used effectively and well before the Court. The Court's recent ruling that a five-person jury in a criminal case was unconstitutional, relied heavily on social science studies comparing relative jury size.[22]

Nonetheless, the Court's opinions in the past term generally underscore the importance of good factual presentations. This Court's "pet" method of analyzing the Constitutionality of state and local legislation has been an "under-inclusive/over-inclusive" test. In striking down a Massachusetts law that prohibited specified businesses from spending corporate funds to influence the vote "on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation," the Court used this under-inclusive/over-inclusive analysis.[23] While corporate expenditures with respect to a referendum were prohibited by the challenged statute, corporate activity with respect to the passage or defeat of legislation was permitted. The Court saw this as under-inclusive.

It is therefore extremely important that, in anticipation of appellate review, you build a good record below. Building a good factual record is now more important than ever because of the need to prove legislative intent in a number of types of cases. After the *City of Lafayette* decision, extensive showings of state legislative intent will be necessary to avoid municipal antitrust liability. The Court's recent decision in *Monell*, allowing municipal liability under 42 U.S. C. Section 1983 where there is a showing of a discriminatory municipal policy, also calls for the ability to prove or disprove intent. Finally, the same requirement arises in the Constitutional cases, after *Washington v. Davis*[24] and *Arlington Heights*.

The lesson to be learned from these recent decisions of the Supreme Court is that the strongest case is the case which makes the best factual showing. In defending state or local action, the facts presented must adequately justify the challenged action. In attacking the application of federal action affecting state and local government, the state or municipality must make a strong factual showing of the way in which the federal action intrudes upon traditional and integral functions of local government, as we did in *National League of Cities v. Usery*. We are doing the same in the attack upon the federal statute mandating federal and state participation in the federal unemployment compensation system. In this legislation and other related legislation the federal bureaucrats are determined to get control of state and local budgets and tell state and local governments what taxes they must impose and how they may spend those taxes. With 85% of local government tax revenues going to personnel costs and 75% of state tax revenues going to personnel costs, the effect of federal control over state and local personnel is again emphasized as it was in *National League*. An article in *U.S. News & World Report*[25] on "How Washington is Moving in on the States" indicated that through the "carrot-and-stick" approach of conditioning federal aid to state and local government, "the long arm of Washington is extending its reach across the nation and threatening to seize what is left of states' control over their own affairs." In that article, Delaware's Gov. Pierre DuPont warns that "One day, Washington will swallow us all up if we don't put limits on it now."

Modern government is intricate, complex and expensive. The people are frustrated by these functions and especially are the people disgusted with the constant attempts of federal bureaucrats to gain more and more control over state and local government services and budgets. The revolt I sense is more against the federal Congress and the President's ever expanding spending programs than against state and local services which the local people choose and are willing to pay for by local taxes.

When Congress or the President lose sight of the Constitutional principles of federalism upon which this country was founded, and which principles, in fact, are older than the Constitution itself, there remains only the Supreme Court to reaffirm those principles. We saw in *National League* that with a well prepared case, state and local government need not be "swallowed up" by Washington.

Today, as in the days of Madison and Hamilton, the Supreme Court remains the umpire . . . the final arbiter of power in the federal system. With effective preparation and presentation of their cases before the courts, state and local governments will maintain their vital role in the Constitutional scheme of federalism. Without that preparation states and local governments will become mere "bureaus" of the federal departments and agencies as the "Clean Air Act" cases[26] before the Supreme Court stated loud and clear!

As a final word let me say that in my judgment the Chief Justice of the United States and the Associate Justices who compose the current Court are just as able, conscientious and hard working as any of their predecessors. They work long and arduous hours in relative isolation performing perhaps the most essential function of our system of government under federalism. Critics the Supreme Court always has had and always will have. Disagreements are guaranteed by the very nature of the difficult task they perform. Leaving personalities aside and judging them on their judgments which is the only true test, they have earned and deserve the respect of all Americans both who agree and who disagree with their deicisons.

FOOTNOTES

[1] 308 U.S. 517.
[2] 369 U.S. 186 (1962).
[3] 426 U.S. 833 (1976).
[4] *The Federalist Papers*, No. 39.
[5] *Ibid.*, No. 80.
[6] 4 Wheat. 316 (1819).
[7] 272 U.S. 365 (1962).
[8] *Zahn v. Board of Public Works*, 274 U.S. 325 (1927); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).
[9] *Young v. American Mini-Theaters*, 427 U.S. 50 (1976).
[10] *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 429 U.S. 252 (1977).
[11] *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).
[12] *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).
[13] *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 (1978).
[14] *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).
[15] *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978).
[16] *City of Lafayette, supra.*
[17] *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).
[18] *Michigan v. Tyler*, 436 U.S. 499 (1978).
[19] 369 U.S. 186 (1962).
[20] 434 U.S. 555 (1978).
[21] 435 U.S. 444 (1978).
[22] *Ballew v. Georgia*, 435 U.S. 223 (1977).
[23] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
[24] 425 U.S. 229 (1976).
[25] June 12, 1978, p. 41.
[26] *EPA v. Brown, EPA v. Maryland, State Air Pollution Control Board v. Train, District of Columbia v. Train*, 431 U.S. 99 (1977).

Part V

Anatomy of a Grant Controversy: Handicapped Regulations and City Hall

The following script was developed by ACIR and the actors whose names are listed below. It is designed to illustrate the legal, intergovernmental, political, and fiscal dimensions of implementing one crosscutting requirement (relating to rights of the handicapped) in one hypothetical city. It also points out the strong federal influence on decisions made at the local level and the importance of federal grants to local budgets and to the operations of some of the most local functions, such as fire protection.

The actors and co-authors of the script were: William Montalto, assistant project director, Coordinating Committee on a Model Procurement Code, American Bar Association; William S. Rhyne, Rhyne and Rhyne, Washington, DC; Stephen Sorett, Office of General Counsel, Environmental Protection Agency; John Settle, chairman, Board of Grant Appeals, Department of Health and Human Services*; and Carl W. Stenberg, assistant director, ACIR. Carol S. Weissert, ACIR information officer, drafted the original script from which the final was drawn and was moderator of the session.

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*At the time of the Conference, Stephen Sorett was with the Office of General Counsel, General Accounting Office and John Settle was chairman, Board of Assistance Appeals, Environmental Protection Agency.

MODERATOR: As a break from the more typical kind of conference format, we've chosen to entertain—and we hope enlighten—you with a simulation of how a city might respond to pressure to conform to crosscutting regulations that they feel are unreasonable. What we hope to do in this simulation is to describe how a controversy arising out of the implementation of crosscutting regulations, in this case rights of the handicapped, might be handled, what the various positions of players are, what their legal strategies might involve, and what the outcome might be. The bottom line is that the grantee is not without legal rights and has administrative and judicial forums available to enforce those rights.

So on with our little play. We begin, as do many acts in real life, with the Congress. In 1973, the Congress passed legislation, Section 504 of the *Rehabilitation Act of 1973* providing that "no otherwise qualified handicapped individual of the United States . . . shall, solely by reason of handicap, be excluded from participation in, denied benefits of, or subjected to discrimination under any program or activity relating to federal financial assistance."

There is little legislative history surrounding the enactment of Section 504. There were no hearings held and almost no attention paid to the law.

It was not until April 1976, that an executive order designated HEW with the responsibility to coordinate the enforcement of Section 504 among all federal agencies. HEW regulations were published in 1977. All other agencies were expected to have theirs by the end of 1978.

In the meantime, various cities, counties, and states continued building facilities and establishing and running programs—thanks to federal money. One of those was a hypothetical city we've called Riverside, OH, and more specifically the municipal fire department.

Let's assume Riverside's municipal fire department is the recipient of these federal dollars:

- the full city share of General Revenue Sharing goes into the firemen's pension program;
- two new fire houses were built by federal public works funds; and
- during the past year, the fire department has received a $500,000 grant from the Public Health Service to train emergency paramedic personnel, a $25,000 research grant from LEAA to develop ways to prevent and detect arson, and a $75,000 CETA grant to train disadvantaged persons as firemen.

In addition, it receives surplus equipment from the federal government and technical assistance from federal agencies including the National Bureau of Standards, the Department of Housing and Urban Development, Department of Labor, Department of Transportation, Federal Emergency Management Administration, and the Department of Treasury. So much for the local firehouse.

The situation as we've dreamed it up for Riverside involves John Downs, a Vietnam veteran who lost his hearing in the war and who applied for employment by the city fire department as a part of its paramedic emergency unit. He was trained as a paramedic in the army and could pass the nonhearing physical requirements of the job.

Mr. Downs took the written examination required of all fire department candidates and scored the highest of all those taking the test. However, when the candidates were called in for interviews, Downs wasn't included. When he found out he had been excluded, he requested an interview on the basis of his outstanding performance on the test. When he was turned down, he went to the local Handicapped United organization which retained an attorney to fight the case.

That's where our play today begins. We've assembled for you these actors who will discuss this controversy, explore the options, and outline the implications of each.

First we have the Mayor—Mayor Carl Stenberg—a young, dynamic Mayor who has actively courted federal funds and used these dollars to renovate large sections of the downtown area, revamp a rather moribund transportation system, and initiate several new social services programs which have already been adopted by other cities across the country.

Mayor Stenberg is very popular in Riverside. He was elected to his second term recently with very little opposition. And he is thought to have plans to run for higher office in the next few years.

Mayor Stenberg is being urged to fight this case by the second actor, Bill Rhyne, the city attorney. Rhyne, too is a young, enthusiastic, dedicated politician who has aspirations of higher office, perhaps Mayor Stenberg's job when he leaves.

Bill Montalto represents the Handicapped United Group. He works for a public interest law firm here and this represents his first really "big" case since joining the firm, so the outcome is very important to him. He will tell you why he thinks he's got a "winner" in this case.

And we have a "fed" in this as well. He's chief investigative attorney from HEW's regional Office of Civil Rights, Steve Sorett. Steve has seen many of these cases before. He's going to tell you why he thinks the city's best course would be to simply comply with the regulations.

Finally, we have Judge John Settle, a district court judge whom we'll join in a pre-trial setting in which he's going to question all the people involved.

Our play takes place in three acts. The first involves a meeting between Mayor Stenberg and Bill Rhyne, the city attorney.

ACT ONE

MAYOR: I'm glad I caught you in your office, Bill. You're a hard man to get hold of.

There have been some new developments in this Downs situation that I need to talk over with you because I'm very upset about them. You remember the Downs case don't you?

CITY ATTORNEY: I know a little bit about it.

MAYOR: Well, let me try to refresh your memory. Downs is a Viet Nam veteran who lost his hearing in the war. He has applied for a job as a paramedic with our fire department. Our fire chief tells me that for some time we've had a city policy that any person hired as a paramedic must also be able to serve as a firefighter. Now, that makes sense to me and apparently it's made sense to the fire department because the fire union in particular has supported this.

But apparently it doesn't make sense to Mr. Downs and to the federal government, perhaps. Mr. Downs scored very high on the written test and certainly is a remarkable candidate in many respects. But, in point of fact, he cannot hear. The chief indicated to me that one of the reasons he was turned down by the examining board was the feeling that under crisis conditions it was absolutely essential that paramedics be able to assume the duties of a firefighter. If you have a paramedic who is performing only paramedic duties, what's going to happen, for example, in a fire when there are oral commands given? It's going to be very difficult for this person to respond.

In light of this situation, we offered Mr. Downs another position with the city, but he turned the offer down. Instead, he felt that we should pursue this matter of basically whether the fire department should hire paramedics who could perform the full range of duties expected of regular firefighters under emergency situations or whether this was unreasonable.

CITY ATTORNEY: Mr. Mayor, where has Downs been with his complaint, do you know?

MAYOR: Well, I understand he's talked to a local organization, Handicapped United, and there's a feeling that because we do accept federal funds, and in particular the revenue sharing moneys and the LEAA arson grant being used by the fire department, that we may, in fact, be discriminating against Mr. Downs on the basis of the *Rehabilitation Act of 1973*. And that's what makes me mad, Bill. I just can't understand this. Who makes the policy for our city—the Mayor, fire department, and city council, or Mr. Downs and the federal government. What is the basis for this?

CITY ATTORNEY: Mr. Mayor, we're not even sure who makes the policy for the federal government.

The *Rehabilitation Act* presents a difficult problem on both sides because it is not a grant statute. It is a requirement applying to all federal grants. This city gets public health service grants, it gets law enforcement assistance grants, it gets all kinds of other grants and the *Rehabilitation Act* applies to all of them. That's bad enough. But both the grant statutes and the *Rehabilitation Act* are written in a broad fashion generally on purpose by the Congress and so each of them has to be fleshed out by agency-drafted regulations. So, we're talking about two different statutes and the regulations of each agency that administers grants to this city. This is going to be a real problem. We don't even know which agency is going to support Downs' case, if any of them. That's why I wanted you to collect the facts to show exactly how important federal money is to this city so that we can make our case on facts.

MAYOR: Well, obviously the feds don't understand our city, because our city over the last several years has done many things for handicapped individuals. We have kneeling buses. We've retrofitted many of our public facilities. We have training programs in many agencies.

What concerns me is the insensitivity of the federal agencies and the unwillingness of Mr. Downs and Handicapped United to see our point of view here. We're not talking about a case of discrimination against Mr. Downs as an individual or against handicapped people generally. In fact, quite the opposite. We're concerned here about what is best for the public and the public safety.

As you might recall, a few weeks ago when I learned of Mr. Downs' complaint and the possibility of Handicapped United and a bunch of federal lawyers getting involved in this issue, I asked the city manager and the fire chief to review the case just to make sure that we had been absolutely fair to Mr. Downs. I also asked them to review the city's policy and to take a look at what some of the implications would be if we respond to Mr. Downs' request or if we choose not to comply.

CITY ATTORNEY: I'll tell you Mr. Mayor, we're not going to win without those facts. That's what I want to hear.

MAYOR: Well, I'll tell you Bill, you're not going to want to hear the facts in some respects because in my view they are devastating to our city.

CITY ATTORNEY: Well, that's good for me. That's how we're going to win. The worse the facts are to you, the better they are to me.

MAYOR: What may be good for you is not necessarily going to be good for me, especially politically. This is a no win situation for the city and a no win situation for me personally.

Let me just highlight some of the facts that are involved here. We estimate that in the short run, the costs of compliance with Mr. Downs' request are not overwhelming—perhaps as little as $5,000. But the costs could well escalate to as much as $500,000, just in terms of what would be involved in revamping our training program, in beefing up our emergency crews and the like just in case a situation were to arise where we would need paramedics but we could not necessarily require them to do firefighting. We are going to have to put on extra personnel, in other words.

What strikes me though as a concern here is if we do retrain our firemen and our paramedics, if we do make these changes in our personnel system, what's going to happen when the police union gets wind of this? What's going to happen when the nurses and the hospitals get wind of this? What's going to happen when the school teachers get wind of this? Requiring a separate paraprofessional position and not expecting the occupants in this position to perform emergency duties strikes me as being very costly to our city.

CITY ATTORNEY: How are you going to get the money to meet this cost?

MAYOR: Well, we would have to reprogram. I don't think there is any other way to do it. Our budget, as you know, is tight. Our citizens aren't going to go for any more tax increases. If they do, it's going to be suicidal to me and perhaps to the city council.

CITY ATTORNEY: I'll tell you, Mr. Mayor, when we try to present this case to Judge Settle, I'd like to have some understandable and sympathetic facts. Try to bring it down to the level of the local library or police station.

MAYOR: All right. Our city manager tells me, for example, that the new library that we plan to construct next year, half of which is going to be paid for by the federal government, half by us, would not be undertaken. We would have to make an across-the-board 10% reduction in the budget of our police department and in our fire department. We would have to postpone, as well, the renovation of the municipal park and zoo. A lot of visible services that I feel our citizens need and want would have to be eliminated or delivered on a delayed basis.

And that's just if we comply. If we don't comply, I understand we stand to get federal funds cut off. Now, the fire department budget, alone, reflects some $5 million in federal funds. That's lot of money. In fact, we may lose all federal funds, if the discrimination case is pressed.

My budget reflects many sources of federal funding and to have these cut off or jeopardized is going to be a fiscal disaster to the city, not to mention the costs of litigation here. I can imagine how much it's going to take to hire the army of lawyers that probably would be necessary to backstop you in this case.

CITY ATTORNEY: The reason that I had you collect these facts, Mr. Mayor, is because we're going to be making new law, especially if this case goes up to the Supreme Court. It would be easy, and 20 years ago cities would not have undertaken a case on any basis other than this, to cite some Constitutional precedent, or cite the legislative history of the statute and to ask that the case be decided on that basis.

But there are no clear precedents in this area. There has not been a federal grant case that's gone to the Supreme Court to be considered on a full factual record since the 1976 decision, *National League of Cities v. Usery*. That was the case that declared unconstitutional the direct regulation of city operations through the wage and hour provisions. But that was not a grant case like this one.

MAYOR: You're telling me that there is no clear-cut case law to support what my city manager tells me is not just an action that relates to the handicapped but a wide variety of other, perhaps you could call them social, goals of the government with which I personally happen to agree but which from the standpoint of the day-to-day operation of the city programs cause huge cost burdens.

In the LEAA program, for example, the police chief and fire chief have told me that we have to submit special certifications to show that we're not discriminating—and not just in the handicapped area, but the employment area and several others.

We have to do environmental impact statements. We have citizen participation procedures. We have historic site preservation statements. We have to pay prevailing wage rates. We even have to go to such ridiculous lengths as to look into the impact on fish and wildlife preservation of constructing a jail or running a juvenile delinquency program. And you tell me we haven't got a precedent for this?

CITY ATTORNEY: Calm down, now, Mr. Mayor. Let's not take on the whole federal government. I think we're going to do better if we construct our horror story on just this one crosscutting requirement, just the *Rehabilitation Act*. This one causes you enough problems because it doesn't have anything to do with the fire department.

We're not talking about a federal rule of paramedics or a federal rule of firefighters, we're talking about an across-the-board rule that doesn't have anything to do with any of our programs. And that's the case that hasn't been up to the Supreme Court. That's the law we're going to be making. Does Congress have the power to enact and do the agencies have the power to enforce this kind of across-the-board requirement, no matter how it is applied? That's why when I get to court I want to stress the application and not just talk about abstractions.

But they're going to fight us at every turn. They're going to say, "You took the federal grant. You took it carrot and stick and now you're complaining about the stick."

MAYOR: Funny you should mention that. You know, I was hoping we wouldn't have to go to court on this. I would like to fight other battles using our legal talent. So I tried what you might call political avenues. I called up (HEW) Secretary Harris' office, for example, to try to explain the situation and convince them to help us out. I got in contact with someone called an intergovernmental coordinator. Can you believe that title?

In any event, this intergovernmental coordinator said the same thing you did, "If you don't like the conditions, don't take the money." I called our Congressional delegation and made the same point. And they told me the same thing. Not only aren't the federal bureaucrats sympathetic, but the Congress doesn't understand that we are dependent upon these federal funds to sustain our services. It's not a matter of volunteerism. I need those federal dollars and our taxpayers are entitled to them.

CITY ATTORNEY: How can we prove it?

MAYOR: That's your job.

CITY ATTORNEY: I'll tell you, Mr. Mayor, one thing that we learned in litigating the *Usery* case in 1976 was that it's really your job. We can present the facts persuasively to a court, but you must develop the facts showing that this is not a voluntary program, that so much of your budget is federal funds and that you just can't make a cut without curtailing services. Those are essential to our case.

I think the real document in this case is not a legal brief but the budget showing all the trimming you've made already and the cuts you would have to make to comply with these new demands.

MAYOR: In other words you're telling me I've got to stick my political neck out.

CITY ATTORNEY: You have to stick your factual neck out, Mr. Mayor. You have to be a witness in this case and show not only that you've trimmed the budget as much as you can, but also that the city really wears the white hat.

One of the problems in this case that's really going to be brought out by a private plaintiff's attorney is the accusation that the city is fighting the handicapped, that the city doesn't want to do right by the handicapped.

Well, I've gone around city hall and talked to city officials. We've done a pretty good job on behalf of the handicapped and I want you to be able to show that.

MAYOR: Well, Bill, I'll tell you. I still think it's a no win situation. If we comply with Mr. Downs' request, it's going to cause service disruptions. It's going to affect our taxpayers and will affect me politically. We will certainly continue to receive federal funds, but we will pay a very high price for them.

If we take on Mr. Downs, I'm going to be labeled as somehow being against the handicapped. So it's a no-win situation. But I understand what you're saying. I am willing to stick my neck out politically and factually.

CITY ATTORNEY: It would help, Mr. Mayor, if you would describe to the court exactly the way you do accommodate the demands of the taxpayers, exactly how the budget is constructed, how you've done the trimming, and how you've already tried to meet the needs of the handicapped in other areas—such as access to public buildings and transportation.

MAYOR: Fair enough. I'll be glad to make those points. And I hope the court, if we get there, will be receptive to that.

How long do you think this would take to see this through to the conclusion?

CITY ATTORNEY: It depends on what Mr. Downs does. If he brings the case or even if the agency starts the proceeding to terminate the grant, you're talking about a year to collect the factual record and get a decision out of the agency or the trial court. You're talking about another year at the court of appeals. You're talking about an additional year at least to go up to the Supreme Court. So, if we're serious about making law in this case, you're talking about three years of litigation. There's no easier way.

Certainly we're going to cite the *National League of Cities v.Usery* case for the proposition that the federal government can't impose these burdens on states and cities. The federal government and even Downs' attorney are going to say, "You volunteered for this. You took the grant with all its conditions and you knew what you were getting into." But there are other legal issues as well. It's by no means certain that this *Rehabilitation Act*, the act for the benefit of the handicapped, even covers employment. That's one of the legal positions that we're going to have to research and present to the judge—that it requires only equal services for the handicapped. We're going to have to research the law and persuade the judge that the kinds of conditions that the federal government can attach to a grant program are limited.

Even if it's true that states and cities volunteer for the conditions, still there are some conditions that are just unconstitutional.

Now, I've read the cases and what I get out of them is this: Conditions upholding the integrity and efficiency in the use of federal funds have been approved by the Supreme Court. The classic case there involved the *Hatch Act*. If you take federal highway money, you can't give it to political patronage people to dispense. We have no quarrel with this requirement or with certain audit and reporting requirements. You don't like the paperwork, but I live with paperwork. I'm not going to be prepared to make a Constitutional challenge to that.

I think the second large area of conditions that I'm not going to challenge is a refusal on the part of the federal government to discriminate on the basis of race, religion, or sex. The federal government has a perfect right to say, "We will not, ourselves, violate the 14th Amendment and we won't give you money to do so either." If this were a race case or a sex discrimination case, I would have no argument against the federal power to do that and in a sense that helps our case because we're on the side of the angels for other kinds of conditions. But we have a real problem in saying that if you take a public health service grant to train paramedics you must amend your program to the tune of half a million dollars to accommodate the handicapped—not in a way that you've found is beneficial to the city, but in a way some bureaucrat or even Mr. Downs and his lawyer have found to be beneficial to the city. That's going to be the essence of our case. That's why I want to show how much it's going to cost to do it. The fact that most cities are doing it doesn't speak of volunteerism but of the essential nature of federal money to cities. That's why I've had you collect these facts.

And you asked about the cost and time of litigation. Riverside might not be alone. There was a coalition in the *Usery* case. There's a coalition of cities in a Constitutional case pending now challenging the federal unemployment law. But even so, the *Usery* case was, and the unemployment case will be, proved with particular facts from particular cities.

If you go back and read the Supreme Court's opinion in the *Usery* case, it has examples of the tremendous burden, both in money and in dislocation of policy that that federal requirement, the wage and hour law, had on cities. Cape Girardeau, MO; Clovis, CA; the State of California; the State of Arizona . . . .

MAYOR: OK, you've convinced me, counselor. You have my support. And I may be a private citizen by the time this case is finished. But it seems to me that what we're talking about when you get right down to it is who runs the city, the federal government, Mr. Downs, or duly elected officials? And it's that issue that I would like to see taken as far as we can get in the courts. And I would certainly assure you of my participation here. We'll continue our fact finding and we'll stand ready to see what Mr. Downs, Handicapped United, and the federal government decide to do in this case.

CITY ATTORNEY: OK, Mr. Mayor, as long as you agree in advance not to make any political speeches from the witness stand, we'll be prepared to go forward with the litigation. And we'll see how serious Mr. Downs and the federal agencies are about enforcing this *Rehabilitation Act*.

ACT TWO

MODERATOR: Now for the other side of the case. A few miles away we have two other actors who are discussing the Downs-Riverside situation. We now go to the office of Stephen Sorett, chief investigative attorney for HEW's regional Office of Civil Rights where we find Steve conferring with Bill Montalto, an attorney retained by Handicapped United to represent John Downs. The conversation centers on the procedures available to Downs in his controversy with the City of Riverside.

HANDICAPPED UNITED: Steve, thanks a lot for taking the Downs complaint personally. You know, you're a mighty hard guy to track down. You must have an enormous case load.

HEW: Just business as usual, Bill, overworked and underpaid.

We're spread fairly thin, but we do our best to investigate thoroughly all complaints that appear to have some substance. Downs' complaint appears to have something that's certainly worthy of a thorough investigation.

HANDICAPPED UNITED: Let me review those facts again for you.

HEW: That won't be necessary. Downs' complaint is clear. I'd rather hear the facts as seen by the Riverside fire department.

HANDICAPPED UNITED: Okay, Steve, no advocacy, but how about a little help on what happens next procedurally. You know I'm new to complaints under Section 504.

HEW: Riverside's getting funds from the U.S. Public Health Service, one of HEW's constituent agencies, to run the very paramedic program John Downs wanted to enter. Since the city is receiving our money, we have the right to investigate complaints for violation of the antidiscrimination provisions under Section 504. By taking our funds Riverside also agreed not to discriminate against the handicapped.

HANDICAPPED UNITED: What do you mean the city has "agreed" not to discriminate? Section 504 prohibits them, legislatively, from discriminating.

HEW: It's part of this carrot and stick. You see, John Downs' rights are founded on the statute. But they're also supported by the grant agreement. In accepting the Public Health Service funds, Riverside agreed to comply with a list of public policy requirements, including Section 504. These are the crosscutting requirements we're talking about right now. These laundry lists of assurances are common to all federal grant programs and the agencies are enforcing them.

Let me get back to HEW's enforcement procedures under Section 504. Under Presidential Executive Order 11914, then-President Ford designated HEW as the agency responsible for developing general regulatory standards for the enforcement of Section 504 by the various federal grantor agencies. These were published on January 13, 1978. These regulations are guidance to grantor agencies which must issue individual agency regulations for the enforcement of Section 504.

These regulations are then binding on grantees like the City of Riverside.

As a grantor agency, HEW also issues its own implementing regulations.

HANDICAPPED UNITED: So a grantee has to deal with the implementing regulations of each individual grantor.

HEW: That's right. But the individual agency regulations do have to conform with HEW standards. And each grantor agency's regulations have to be cleared by HEW's Office of Civil Rights in Washington before they can become effective.

HANDICAPPED UNITED: The grantee definitely has a load to bear with all these different regulations. But enough sympathy for the intergovernmental system. What rights do HEW's procedures accord to my client?

76 **HEW:** The enforcement and hearing procedures of Section 504 are the same as those under Title VI of the *Civil Rights Acts of 1964*. These procedures are prescribed by the 1978 amendments to the act and therefore they apply to all grantors.

HANDICAPPED UNITED: Well, we filed the complaint. That's the first step for sure.

HEW: That's right. And having determined that the complaint isn't frivolous, we'll investigate Downs' complaint. That's the first step of the investigation.

If we find that Riverside does not violate Section 504 and HEW's implementing regulations, we'll notify them in writing that the complaint has been denied.

If we find noncompliance, however, we'll try to negotiate a settlement between Downs and the city. Obviously we'd like to close out this matter by a compromise and accommodation. No hard line—OK?

HANDICAPPED UNITED: Sure, Steve. The city need only make Downs a paramedic. Okay, okay, negotiations later. Tell me more about the process.

HEW: Since you're so sure Downs' complaint will be successful, let's just assume we agree and find Riverside has discriminated against Downs in violation of Section 504.

But first, before I get started, let me tell you that under another Executive Order, the Department of Justice has overall responsibility for the enforcement procedures under Title VI of the *Civil Rights Act of 1964*. Justice has issued governmentwide standards for compliance regulations issued by the individual departments. Since Section 504's enforcement procedures are the same as under Title VI of the *Civil Rights Act*, these standards from the Justice Department must be followed as well as the enforcement regulations of the individual grantor agencies.

HANDICAPPED UNITED: Another set of governmentwide standards. Do you make it this complicated just for fun?

HEW: Hey, I'm just a bureaucrat. I'm not a Congressman. And I'm not running for higher office, either.

Seriously, suggestions for reform should be directed to Congress, not me. Do you want to hear the rest of the process or not?

HANDICAPPED UNITED: Please, go on.

HEW: Well, under the Justice Department standards, any efforts at negotiation must be reported to Justice once they continue for 60 days or more.

Let's assume negotiations fail, as I'm sure they won't in the Downs case, and both parties are standing firm. The next step is to have a formal hearing.

HANDICAPPED UNITED: These hearing procedures are the same as those for complaints under Title VI of the *Civil Rights Act*. Isn't that part of a comprehensive set of procedures?

HEW: That's right, in 45 CFR. They don't leave much out as they provide the parties a full due process hearing on the record. The object of the hearing is to have both sides provide the facts fully as they see them. The procedures are designed to provide for a full exposition of all relevant facts, even if it is at the expense of formal rules of evidence.

HANDICAPPED UNITED: Isn't this formal hearing preceded by a pre-hearing conference?

HEW: Yes. The pre-hearing conference is another attempt to resolve the matter by settlement between the parties. It's also designed to narrow the factual issues of controversy. During the pre-hearing conference the parties exchange exhibits which become part of the record. If the exhibit is not exchanged at this stage, its admission may be denied later during the actual hearing. The goal here and throughout is the same. Get the facts on the table.

HANDICAPPED UNITED: Depositions are permitted, aren't they?

HEW: Yes. Either party may introduce depositions into the record prior to the commencement of the hearing. Also, affidavits are admissible at the same time.

HANDICAPPED UNITED: How about during the hearing, examination of witnesses seems to be less constrained than in a court.

HEW: Correct. The procedures are designed to get all relevant facts into the record. For example, cross examinations of the witnesses need not be limited to the subject matter covered on direct questioning, which is quite a departure from a trial. You also should know that the arguments of law are confined to written briefs. Your hearing officer will decide the case on a factual basis, but he won't get into questions of law.

HANDICAPPED UNITED: One of my partners of the firm mentioned that *amicus curiae*—friend of the court—participation is authorized by the rules.

HEW: Any briefs of interested parties do become part of the record.

HANDICAPPED UNITED: Great. Riverside's chapter of Handicapped United may be able to seek participation of its national organization. The executive director indicated this case is sufficiently important that other organizations interested in the rights of the handicapped should be informed and their active participation solicited. Maybe we can put together a coalition to fight this matter all the way. But let's get back to the procedures.

All right, the hearing's completed. All the post-hearing briefs and reply briefs have been filed. What's next?

HEW: The hearing officer issues a decision. Either party may then request a review of that decision. If no review is requested, the decision is deemed to constitute a final agency action within the meaning of the *Administrative Procedures Act*. An appeal may then be taken to court.

Alternatively, the rule provides for appeals to a reviewing official, usually to the head of the grant-making agency. In your case, the Public Health Service, and then a second appeal to the Secretary.

Now, this first appeal to the reviewing authority is an appeal of right. The reviewing authority must review the initial decision. However, the second appeal to the Secretary is discretionary. You've got no right to it, and she need not agree to any further review for decision on it.

HANDICAPPED UNITED: This supposedly expeditious administrative procedure is beginning to sound like it will take a very long time. We'd originally planned to file suit in federal district court. My partners may have been right. Direct judicial action may have been better than the course of this administrative procedure.

HEW: Frankly, I wouldn't expect quick results out of either approach. There's a lot at stake. Both judicial and administrative procedures are going to require lengthy and costly legal representation. That's why we stress resolution through compromise and agreement at the early stages.

HANDICAPPED UNITED: We went the administrative route because we felt the sanctions to be faced by Riverside are greater in the administrative forum.

If they are ultimately found to be in violation of Section 504, all of their federal assistance funds are subject to termination and in addition I have heard that they are not eligible for award of new funds. That certainly should get their attention.

HEW: It generally does. A city cut off from that money is like a horse in the water which can't swim.

However, there are some additional and very important wrinkles that you should be aware of. First, the termination of current funding and ineligibility for future funding only goes to the agency or the department found to be discriminating. In this case, that means just the fire department. The sanctions are not applied to all of Riverside.

Second, before the sanctions become effective, the grantor agency must give 30 days notice of the intended termination action to the House and Senate oversight committees who have jurisdiction over the agency concerned.

HANDICAPPED UNITED: This administrative route is getting less appealing all the time. This Congressional oversight element worries me the most. It would seem that a governmental grantee with a strong Congressional delegation could seemingly delay application of the sanctions even if they were found to be in noncompliance with 504.

HEW: That's right. It's a risk. But remember too, that either party has the right to appeal the administrative decision of noncompliance to the courts.

HANDICAPPED UNITED: Does such an appeal automatically suspend the application of the sanctions?

HEW: No, but it would tend to make the agency move cautiously. And it would give the Congressional committees a firm basis for recommending that the agency not terminate funding of the grantee.

HANDICAPPED UNITED: Do you have any other "good news" for me?

HEW: Let's talk about some other options that might be available to Downs.

HANDICAPPED UNITED: It appears to me that our best course of action may be to file suit under Section 504 like my partner suggested. 78

HEW: A recent decision in the fourth circuit may have cut off your client's private right of action under Section 504.

HANDICAPPED UNITED: I'm aware of the *Trageser v. Libbie Rehabilitation Center* decision, but I don't believe it will be followed generally. The fourth circuit, you probably know, maintains that in 1978 when Congress made the enforcement procedures for Section 504 the same as those under Title VI of the *Civil Rights Act,* it carried along the judicially interpreted limitations as well. Elimination of a private right of action except under the most limited circumstances is what was found. But at least one court—the southern district court of New York—has held that a private action remains even after the fourth circuit court of appeals decision.

HEW: You're correct about the *Trageser* case. But what was the name of that New York case again?

HANDICAPPED UNITED: *Guardian Association of New York v. New York City Civil Service Commission.* It really helps anyone who would be locked out by the *Trageser* decision.

HEW: That's interesting. Well, you know I think you're still going to have trouble going forward, going alone.

HANDICAPPED UNITED: Well, who's going to join us?

HEW: It's possible we could.

HANDICAPPED UNITED: How so?

HEW: You remember I mentioned earlier that the Justice Department has overall responsibility for the enforcement of Title VI of the *Civil Rights Act of 1964?* It was given this responsibility by Executive Order 11764. Under that order, Justice has issued guidelines to be used by the various federal agencies in preparing Title VI enforcement regulations. And without going into too much detail before you've had a chance to read them, I want to point out that direct judicial action is authorized by us to enforce the assurances contained in the grant agreement. We can go right to court.

HANDICAPPED UNITED: What you're suggesting is that if Downs has trouble with the private right of action, he can bring the action and HEW could bring the action and then Handicapped United could join the suit. That sounds pretty good.

HEW: There may be another benefit too. If Downs goes for it alone, the relief available to him could be acceptance into the program. That's it. If successful, any benefit Downs receives will establish a useful precedence in similar cases. But that's about it. Whereas, if the department goes forward to enforce the city's compliance of Section 504 in accordance with the agreements in the grant agreement with its promise to do so, then a finding of noncompliance would result in an immediate loss of funds. A court would have found noncompliance and the enforcement of the sanctions could take place subject to a public review, obviously.

HANDICAPPED UNITED: Looking to the contractual basis of the grant agreement—the grantee's promises to abide by the various national policy requirements—seems to be a quicker way to get the desired result, the end of the discrimination, as it applies to Downs and others like him.

Another thing. One of my partners suggested that complaints be filed with other grantor agencies providing money to Riverside fire department. What effect could this have?

HEW: Since the matter grew out of the same allegedly discriminatory action, all of the complaints would be consolidated during the hearing phase at HEW. Prior to that, each agency may choose to undertake its own informal investigation and attempt a settlement.

If the city was found in noncompliance, all funds to the fire department from all of these various grantors would be terminated. The financial impact certainly would be greater.

HANDICAPPED UNITED: This has all been very helpful. I'm going to have to give it a lot of thought and discuss it with my partners. Once you've completed your investigation, we'd be anxious to hear the results and maybe we can get together and talk again.

HEW: I wish you good luck.

HANDICAPPED UNITED: Thank you.

ACT THREE

MODERATOR: Now that you've heard all the facts and procedures of the case, the scene shifts several months later to the chambers of U.S. District Court Judge John Settle who is just about to start the pretrial conference.

JUDGE: Sit down, gentlemen. We've got a busy agenda today. I've got a couple of other cases coming up rather quickly.

CITY ATTORNEY: Excuse me, Your Honor, I've asked the Mayor of Riverside to come with us because the facts are so important in this case. He'll be pleased to answer any of the court's questions.

JUDGE: Do you have any objection to that, gentlemen?

Welcome, Mr. Mayor. We understand you're seeking reelection this term.

As you know, gentlemen, this is a pretrial conference to consider two cases which have been consolidated. I've got the files here. They involve some common issues. The cases are as follows:

First, we have an action brought by Mr. Downs of the City of Riverside. As I understand it, Mr. Downs seeks an order which would require the city to cease discriminating against him on the basis of his deafness handicap in violation of the *Rehabilitation Act of 1973.*

Second, we have an action brought against HEW by Riverside to enjoin HEW from terminating grants to Riverside. The record indicates that HEW has determined through a rather involved and time-consuming process of investigation and administrative hearings that Riverside discriminated against Mr. Downs in violation of Section 504.

Gentlemen, you're aware that this pretrial conference will be conducted informally and its purpose is to narrow the issues in the case and to develop a better understanding among all of us, and particularly me, about what's at issue here and how best to proceed once we get to court.

I've never had a case under 504. I haven't had a chance to look at these files before we came in here today so I may be asking a couple of naive questions and you'll have to enlighten me.

Mr. Montalto, let me ask you first of all, on what basis is Mr. Downs claiming that this court has jurisdiction over this claim? Are you claiming a private right of action under Section 504?

HANDICAPPED UNITED: Yes, Your Honor. The 1978 amendments to the *Rehabilitation Act of 1973* added a Section 504 which made available to handicapped persons the rights and remedies available to other persons under Title VI of the *Civil Rights Act of 1964.* We contend that this confers the private right of action to a plaintiff in such a case.

JUDGE: Mr. Rhyne, what's your response to that?

CITY ATTORNEY: Well, if I understand Mr. Montalto's argument, Your Honor, it is that it doesn't matter what grant program we're talking about, when we're talking about the *Rehabilitation Act.* As soon as Congress says it thinks Title VI ought to be broader, he believes that it implies a private right of action.

I think, Your Honor, the court is going to have to look at the statute rather than some argument of counsel that implies the private right of action. I think the threshold question is which statute are we talking about? Are we talking about the Public Health Service grant program in this case the Emergency Medical Services Amendment? Or are we talking about the *Rehabilitation Act* itself? We contend it is the medical services program which is relevant here.

I don't think there's any question that the *Medical Services Act* doesn't imply a private right of action. It gives money for paramedics, fire training and for other health services training, and education demonstration grant purposes. There's nothing there that talks about the handicapped.

JUDGE: Mr. Rhyne, if he doesn't have a private right of action under Section 504, does he have any other remedy?

CITY ATTORNEY: He has a suit under the *Civil*

Rights Act. He can join his brethren in suing the city for all sorts of alleged Constitutional violations there. I think that's really the heart of the case, Your Honor. If he's talking about a Constitutional violation, he doesn't have much of a case.

JUDGE: He's not arguing a Constitutional violation, he's arguing the violation of Section 504.

CITY ATTORNEY: And that's the deficiency in the statute as we see it, Your Honor. If this were a grant condition upholding some Constitutional principle, if it were a sex discrimination prohibition of the *Civil Rights Act,* if it were any part of Title VI, we'd have no problems with this case. First, we wouldn't be violating the 14th Amendment and we would have no problem with the federal agency enforcing the Constitution.

But this is a right that Congress and special interest groups before the Congress decided they 80 would call discrimination. We think even under the *Rehabilitation Act* there's no private right of action.

Talking about Title VI, the omnibus civil rights enforcement provision for federal grants, doesn't help Mr. Downs' case because Title VI specifically says no agency shall bring an enforcement action and then goes on to say where the purpose of the program is employment.

JUDGE: We'll get to employment later. Let's move on here because we don't have too much time.

Mr. Sorett, I understand that HEW went through a fairly extensive process to come up with the conclusion that Mr. Downs suffered discrimination at the hands of the city.

Can you very briefly describe the process and what HEW's findings were? And as I understand it, you are moving now to cut off the grants. Is that correct?

HEW: That's correct, Your Honor. We've made a finding and we want to terminate the funds right now. And this is why the city is trying to block our action.

First what we did is the ordinary thing. We conducted an investigation to determine if the complaint, as stated, had any merit to it at all. We found that it did.

The next step was we tried to compromise the matter. We got officials of the city together with opposing counsel and we tried to work something out. And rapidly it became obvious that we were at loggerheads.

We then went on to an informal hearing as prescribed by regulation and at that time we made a finding that Downs is "otherwise qualified" to be a paramedic.

JUDGE: Mr. Rhyne, what is the basis upon which you claim that this court should review HEW's action?

If we do review it, what standard of review should we use? Are we talking about an "arbitrary and capricious" standard?

CITY ATTORNEY: We're talking about, I think, really a "higher than rational" basis. We're not challenging a fact finding. I don't think that HEW's determination that all paramedics need not be firemen is fact finding. I don't think arbitrary and capricious really applies here. What we're talking about is interpretation of the law. We're really talking about the rationality of the statute and the regulations themselves.

Because this isn't a Constitutional civil rights case, I think under the doctrine of federalism throughout the Constitution, both Congress and HEW in its regulations have to have a "higher than rational" basis to support their attempt to restructure Riverside's fire department.

JUDGE: You seem to acknowledge that on the basis of HEW's interpretation of these guidelines and the law, that there has been discrimination and what you're attacking is the underlying law. Is that correct?

CITY ATTORNEY: Well, Your Honor, I suppose we quarrel only with the use of the word discrimination. We think discrimination applies to those things that are prohibited by the Constitution. We think there's no question what the record shows, that we did not admit Mr. Downs to the fire program and for very good reason. There's no question that we did violate the regulations. We think the regulations are invalid.

When Congress says you shall hire the handicapped no matter how much it costs, and that's really what Congress said in this case, they made no finding of the need for the legislation. They made no finding of the costs on states and cities who must comply with the legislation.

When Congress says that, they should have to come up with the facts to support that legislative judgment or that judgment is unconstitutional under federalism.

JUDGE: Let me ask a question about that.

First of all, a preliminary question because I think we're getting into the *National League of Cities v. Usery* case. Before we get to that matter, I want to ask clarification of an issue.

Now, the *Usery* case did not deal with grants, and as a matter of fact it specifically excluded its application to grant situations. I don't know much about grants, but I've always had the impression that they were essentially gifts and that the community is free to accept or reject them. I assume that Mayor Stenberg chose to accept these grants and he took the conditions that came with them. It's rather like a bargain and sale, isn't it?

CITY ATTORNEY: Well, I don't think it is, Your Honor, and I suppose the first premise is whether Mayor Stenberg had a choice, whether he chose anything. I'd like Mayor Stenberg briefly to address why he didn't feel he had a choice. Because I think his intent really is the best proof that taking federal grants is not really voluntary.

MAYOR: Your Honor, my city, like many cities across this country, is hard pressed in these inflationary times and we need every available dollar we can get, not just from our taxpayers but from the state government and the federal government as well. We use these dollars to support basic services. We have a commitment to our taxpayers—people who sent me and my city council to office—to provide services to meet their needs. Our budget contains funds from several different sources and the issue, as I see it that brings us together today, is one of the costs of compliance. Counsel has indicated Congress apparently ignored this cost issue entirely in enacting this legislation and HEW is ignoring entirely the issue in applying it.

In terms of my particular jurisdiction, Your Honor, for us to comply as Mr. Downs would have us do it, would cost us several hundred thousand dollars which we don't have. If we don't comply, my fire department alone is going to lose $5 million and perhaps other city agencies will be cut back as well.

Either way, I violate a budget commitment that I have to my voters.

JUDGE: Mr. Stenberg, you sound a little bit like a junkie who is being told he's going to be taken off heroin.

MAYOR: Your Honor, you were a Mayor once, and even though I realize that was more than a decade ago when many local governments perhaps weren't as dependent on federal funds as they are now, surely you received sums from federal and state agencies that you put into your budget to dispense much-needed services. This isn't funny money. This isn't seed money. This is basic support money to keep cities running.

I've just returned from the annual meeting of the National League of Cities. I had an opportunity there to talk with several of my colleagues about this situation. The federal government is applying these regulations to achieve particular social purposes even if they have absolutely nothing to do with what we are trying to achieve locally. From my particular jurisdiction we're talking about hundreds of thousands of dollars. When you multiply that by even half of the local governments in this country, you are talking about a billion dollar price tag for compliance. We feel that price tag is exorbitant.

CITY ATTORNEY: Your Honor, if I could just bring home the Mayor's comments within the law a little bit. I think his political reaction is a very human reaction. It's also supported in the law. That's the pernicious thing about these crosscutting requirements. This requirement, as applied in Mr. Downs' case, to hire a deaf person and adopt his changes in the fire department paramedic program, is not only costly but it also conflicts directly with the statutory purposes in the Public Health Service program.

I took a look this morning at the statute that gives the basic grant and it requires an emergency medical system to be one that joins the personnel in facilities areawide through a telephone communications system.

So we're not objecting because we don't want to spend money on the handicapped. We're objecting because Congress speaks out of both sides of its mouth in different years and then gives to one agency the requirement to impose both inconsistent requirements on Riverside.

JUDGE: Let me ask you just a couple of questions to follow up on that. I think you can address them together because they both involve economic issues.

First, I think that you would be willing to agree that there probably are some valid social demands that the federal government can impose on other levels of government regardless of costs.

CITY ATTORNEY: Yes, we agree with that, Your Honor.

JUDGE: Secondly, as I understand it, you're arguing that the *Usery* case, as you would have it applied, would require the federal government to issue its regulations, only after an examination of the economic impact of those regulations on local governmental operations. And of course the statute doesn't require that. As I understand it you are arguing that the Constitution would require such an assessment.

CITY ATTORNEY: That's correct.

JUDGE: That seems to imply that there are reasonable and unreasonable burdens that may be placed on local governments by the federal government. What should be the line for determining when a burden on a local government is unreasonable? How does a court determine that?

CITY ATTORNEY: Your Honor, I'm going to want judge's pay if I have to draw the line. Our position is that we're on the good side of the line, that this condition is not one on the supportable side of the line.

The way we can make the most sense out of it over at the city attorney's office is by comparing this case on its facts to the last grant case that went up to the Supreme Court—*North Carolina v. Califano.* In that case, the state objected to a requirement under another of HEW's programs for areawide health planning—that it appoint a body to do the planning for the region.

North Carolina said, and it was undisputed on the record, that to appoint such a body would require amending its constitution.

North Carolina made no challenge to the reasonableness in general of HEW's requirement. It did not, and we feel could not, say that areawide planning was a bad thing. It did not and could not say that areawide planning would cost more. The evidence suggested it would cost less to plan on an areawide basis than to have duplicative hospital facilities.

So North Carolina had to use the stock anti-New Deal objection that the federal government can't make it amend its constitution. That argument was unpersuasive to the trial court and the Supreme Court summarily affirmed that ruling.

Now, wherever the line is, that case, upholding the grant condition, is quite different from this one where we're talking about a half million dollars a year and where a requirement means that the city must change its policy that paramedics must be full-fledged firefighters. We think that that kind of impact, that kind of condition, without any showing by Congress or the agency that it's needed or has a reasonable cost, is invalid.

JUDGE: Mr. Sorett, let me turn to you.

As I understand it from looking through this record briefly, the evidence does indicate that the city would, in fact, suffer a substantial economic loss. There's no question about that. That seems to have been established in your own administrative process and indeed it's clear that there would be some disruption of the city's activities if it complied with the letter of your regulations in this case.

Is this something that you can reasonably ignore?

HEW: It's not something that we reasonably ignore. But at the same time we have to balance the costs versus the benefits just as an economist might have to do.

Here HEW has investigated and determined, under its own criteria, that the costs that would be imposed would not be significant. We made this determination and that's one of the reasons why we're going ahead with what we're doing.

Another factor to be considered is that the costs are certainly justifiable. And we feel, contrary to what counsel is arguing, that the conditions laid on these grants are ones which the Congress and various social commentators have accepted. As a matter of fact, some people from their own state voted for this thing. The question is, who speaks for the city and who speaks for the state?

We have Congress speaking out of both sides of its mouth. At the same time at the local level you have various and conflicting opinions, as well. So I feel a cost analysis is not so outrageous as counsel would make it seem.

JUDGE: Mr. Rhyne, why does a paramedic have to be a fireman?

CITY ATTORNEY: Your Honor, I suppose the Constitutional answer is because that's what the city decided. You asked earlier what remedy Mr.

Downs would have, if he had a challenge to the rational basis on which the city decided that a paramedic had to be a fireman. He has a remedy for that in the *Civil Rights Act* or a direct Constitutional case. This case is not so much about whether the city is right, but whether the federal government is right in saying that its judgment is the one that governs, quite apart from reasonableness. It's almost a supremacy argument. Washington has the grants, the larger tax base, the dollars. If states and localities want some of these dollars, they must do what Washington says, no matter who is right. In a sense, this case isn't about who is right, it's about whether the federal government is exempt from the requirement to prove that it's right.

And the federal argument, as I understand it, is that it must be right because Riverside did not have to take these grants. That impact analysis has nothing to do with this case, the rightness of all these federal determinations had nothing to do with this case because Riverside has the power to walk away from the program grant and conditions, both. So we think that we're right in our determination in how to run the fire department.

JUDGE: Mr. Rhyne, apparently HEW did do some sort of an impact analysis, either when they issued the regs or when they made this decision. I assume you take issue with the adequacy of that. But more important than that, I understand your argument to be that back when it passed the law Congress should have had an impact analysis done. Is that correct?

CITY ATTORNEY: We think that both the Congress and the agency should have faced up to the impact of this.

JUDGE: Let's speak to Congress now. Did Congress have a Constitutional obligation to address the economic impact of this law?

CITY ATTORNEY: Like any other requirement that Congress levies on cities—payment of prevailing wage and all of the other non-Constitutional federal conditions—these crosscutting conditions have to be rationally based, at a minimum.

Moreover, in a challenge to the Constituionality of legislation, when the city, one city in this case or a collective of cities, makes a showing that the impact of compliance with this condition would be severe, then I think Congress must have shown a "higher than rational" basis in passing the legislation. It must show a terrible discrimination against the handicapped as part of the "higher than rational" basis test, which is used in First Amendment areas and other areas. It must show that Congress chose the means of curing this handicapped discrimination that's least intrusive to state and city governments. That's the real thing that's missing in this case. We don't think there was any least obtrusive means analysis on this legislation.

JUDGE: Let me ask you Mr. Rhyne, moving on to another subject. Do you think that Section 504 reaches employment practices per se?

CITY ATTORNEY: We don't. We think that as a matter of law it does not. Congress certainly expressed no intention of covering employment. It said that the handicapped shall not be discriminated against and I think a close reading of a statute like that compels the conclusion that the handicapped who are protected by the statute are the beneficiaries of federal grant programs. Beneficiaries of the Public Health Service program are the people who receive emergency medical assistance.

It is a clear violation of the statute to discriminate against the handicapped in providing emergency medical services. That doesn't mean that it is a clear discrimination not to hire handicapped paramedics.

JUDGE: Mr. Sorett and Mr. Montalto, do you feel differently about that issue?

HANDICAPPED UNITED: I'd like to speak to that, Your Honor. We maintain that 504 protects and reaches employment. HEW's governmentwide regulations take this position. More recently the Department of Justice adopted regulations that take the same position. We have noted in our briefs that several district courts have taken the position—in Florida, in Pennsylvania, in California. But more important than that, the legislative history of Section 504 demonstrates that it is a remedial statute. It is trying to protect the handicapped. We agree with counsel that the words are less than clear, but the legislative history which is set forth in our brief clearly indicates that Congress wanted to protect the handicapped when it passed that statute.

Further, the report which accompanied the 1978 amendments that established these procedures noted that the objective was to confirm by legislation HEW's enforcement procedures. I think it's clearly arguable, and the court can certainly look to our brief, to see that the legislative history is there to support the application of Section 504 to employment.

HEW: Your Honor, I just want to interject another thought.

The Law Enforcement Assistance Administration supports our position as well, that the employment practices, per se, are affected by Section 504. The LEAA regulations came out in the *Federal Register* (44 *Federal Register* 54950) on Friday, September 21, 1979. They were the result of a full analysis of court cases and came squarely down on our position.

JUDGE: Did LEAA conduct an economic impact analysis?

HANDICAPPED UNITED: As a matter of fact, they considered the economic impact and pointed out that the cost nationwide per year to comply would be under $100 million.

JUDGE: What is?

HEW: $100 million is considered the standard to determine if there is significant economic impact.

CITY ATTORNEY: Your Honor, those bureaucrats certainly didn't come to Riverside. I think as I understand counsel for Mr. Downs' or HEW's position it is the standard "we're the experts" routine by federal attorneys. The agencies are the subject matter experts and they're entitled to great deference.

Now, the last time they tried this argument was in the Supreme Court under this very statute, not on the questions before the court this afternoon—whether the *Rehabilitation Act* covers employment—but under the same statute, under Section 504. That was the *Southeastern Community College v. Davis* case decided by the Supreme Court last term in which the Court said that, "Although an agency's interpretation of the statute under which it operates is entitled to some deference, this deference is constrained by our obligation to honor the clear meaning of the statute." That's what we urge on the court, not the standard assertion by the federal agency lawyers that they are the experts on their statutes. This court is the expert on this statute.

JUDGE: Let me follow up on that with a question to Mr. Montalto. Based on the *Southeastern Community College v. Davis* case which was referred to in the record, I'm wondering about the analogy to this case. In *Southeastern,* the Court apparently held that there was no obligation under Section 504 to make substantial modifications to the operation of a hospital emergency room in order to accommodate a handicapped nurse. How is your case different?

HANDICAPPED UNITED: The *Southeastern* case held that the college did not have to make a fundamental alteration to its training program for a registered nurse. They had a deaf student who just could not participate in the clinical part of the training. We recognize the similarities, but we see clear differences. Mr. Downs is already a qualified medic. He unquestionably is able to perform the duties of a paramedic. During his service in the United States Army he had 27 weeks of training as a paramedic. His training was under the stiffest conditions imaginable. He served as a combat medic in Viet Nam and, in fact, that's where he lost his hearing.

We recognize that Mr. Downs now has a handicap, but despite his hearing loss he can provide emergency medical services. That's the nature of the job, emergency medical services.

Riverside doesn't want to give him the opportunity to prove that he is competent. He took a written test and that's the last he heard.

JUDGE: Can you respond to that briefly, Mr. Rhyne?

CITY ATTORNEY: Your Honor, we think that the *Southeastern Community College* case is on all fours with this one because just as Ms. Davis was not qualified to be a nurse as that term was commonly understood and applied by the college, neither is Mr. Downs qualified to be a full-fledged firefighter as that term is commonly understood and applied by the city.

HEW: To respond to that, while we agree that Downs may not qualify as a full-fledged firefighter, the question remains is why does Downs have to be a full-fledged firefighter in the first place? We maintain that all he has to do is be a paramedic.

One other fact I'd like to bring out about the *Southeastern* case is that the Court was impressed by the fact that there was no way this student could be trained to be a nurse. How could someone who is hard of hearing participate in a clinical program where life and death decisions had to be made based upon the ability to hear? The court decided that whatever training Ms. Davis could have received it certainly would not have been that of a registered nurse. Whereas here, Downs is qualified already. Training is not a factor. The only factor is how do you reasonably accommodate the individual? We feel accommodation is possible and should be pursued. That would drive down the cost to the city, by the way, to just accommodate this individual.

JUDGE: As I understand it, however, the city would argue that as in this situation with the nurse in an operating room, a fireman needs to be able to hear in order to be able to save lives and respond in an emergency.

HEW: A fireman does, but a paramedic may not. You would not expect a paramedic to be running into burning buildings. Some accommodations could be made. I'm not trying now to lay out a laundry list of what may be the accommodations that are possible. But let me give some examples of what could be done, off the top of my head. A paramedic could work in teams with somebody else who in turn could be the person who signals the paramedic. When you're dealing with a patient, if the patient makes inaudible sounds or sounds difficult to hear, a team member could pick up on that and relay the information to Downs. Downs would not, himself, be placing other people in a life and death dangerous situation. Instead, Downs, at best, would only be placing himself in a perilous situation. And I feel Downs wants to pursue this course. It's a risk he is willing to undertake. I think he should be accommodated.

CITY ATTORNEY: Your Honor, if I could respond to that. I think that really Mr. Sorett's argument is useful to the court not so much for what he said, but because of the very fact that he said it. It's really demonstrative evidence. Here we have a lawyer for a federal agency with a better idea of how to run the fire department. And that was just the approach that the Solicitor General took in the *National League of Cities v. Usery* case. Oh no, this wage and hour law will not cost as much as states and cities say it will because the federal Labor Department has a better plan.

JUDGE: Let me stop you right there. Busing was certainly considered to be a better plan. Do you have an objection to court-ordered busing?

CITY ATTORNEY: Not when a clear violation of the Constitution has been shown. But I think it's important for the court to realize the practical and political ramifications of granting a federal agency the power to say that they have a better plan for the fire department. And I'd like my Mayor to respond to that briefly.

MAYOR: Your Honor, I'm not an attorney and I can't cite case law and precedent, but I can point this out to the court that this is not an isolated case. This is not just a matter between the City of Riverside, HEW, and Handicapped United. This ultimately involves thousands of local governments across the country. It's very obvious to me that the federal government thinks that it knows how fire departments at the local level should be run. Socially, politically, and I think, legally this is abhorrent. If this is the case, that the federal government wants to run the local fire halls, then they should pay for it. Yet they are unwilling to meet what we consider to be the unreasonable costs involved here.

JUDGE: Mr. Sorett, let me come back to you for a moment. I note from the record that apparently there are all sorts of different rules concerning Section 504 implementation depending on what agency you're dealing with. Now, this hasn't been a confederation for about 200 years and I think we have the right to expect the federal government to speak on a unified basis.

Why shouldn't I find that this disjointed implementation is persuasive evidence of arbitrary and capricious action on the part of the federal government?

HEW: That would just be a wrong decision, Your Honor, not to be presumptuous. HEW has issued agencywide guidelines, though. We have tried to have all the agencies bounce their regulations against us so that we can come out with some type of uniform posture on the matter. However, we have to realize that there are some 500 odd grant programs on the books right now for supplies, for services, for construction items. There is no way that we can attempt to write one uniform regulation that would straitjacket all of these different programs. That would not be our purpose. We try to lay out a standard, to outline certain goals to be met. Then we review those agency regulations before they become effective to see how well they meet that standard.

Once they're effective, though, we feel it's the obligation of the individual grantor and assisting agency to administer those standards.

JUDGE: Mayor Stenberg, do you have any comment on the differential impact of the maze of different regulations implementing the same simple law?

MAYOR: They create many headaches for me, Your Honor, and for my staff. In fact, we have to hire experts to run through this maze of regulations of conflicting programs. These regulations increase the administrative costs of doing business with the feds enormously. And in particular, they subject our city to what we consider conflicting, and perhaps arbitrary, federal regulations that attempt to tell us how we should hire our employees, how we should involve our citizens in decisionmaking, and basically how we should run our government. We feel that we should be the ones to run our government, and furthermore, that we've established a clear receptivity to the needs of the handicapped by providing special programs and eliminating certain structural barriers impeding their access to public services.

Therefore, the federal government's involvement through its various agencies telling us how to meet these needs to varying degrees seems unwarranted.

CITY ATTORNEY: Your Honor, the discrepancy among the federal regulations certainly impeaches the argument of counsel that an economic impact study was done on the HEW's pattern regulation. We're talking about the regulations that were applied here under Public Health Service programs. To say that they have some guidelines for each enforcing agency that most of them haven't followed is no answer to the problem of the impact on Riverside. The agency lawyers say, "most of them haven't adopted regulations. So when you have a challenge to the enforcing agency's regulation, look to our economic study of our drafting model." I think you have to look at the economic impact of the regulations of each agency.

If this had been a different grant statute, a different enforcing agency, we might have a different result in the case. That would be wrong. I think our position is they're all arbitrary and capricious because they're not all the same.

JUDGE: Let me ask one final question here, gentlemen. You people seem reasonable. What is it that's keeping you apart? What we're here about is getting Mr. Downs a job. Is Mr. Downs willing to accept another job in the city for equal pay, as I understand has been offered to him?

HANDICAPPED UNITED: Your Honor, counsel for the city and its Mayor have constantly harped on economics, dollars and cents. I'm talking about a human resource. We have here a man who is a trained paramedic, who has served as a paramedic in the armed forces, who can perform the duty. He is willing and anxious to serve the city. We were shocked that Mayor Stenberg, who is a progressive Mayor, who has done much for the handicapped, turned down this request. There has been this decision that every paramedic must be a fireman. There is good basis for that, but there is also a perfect opportunity here to set up a paramedic unit that is not attached to the fire department and Mr. Downs would be one of their most outstanding paramedics. He can do it. We believe preserving this human resource may cost you some dollars, but it counts.

CITY ATTORNEY: Your Honor, I think Mr. Downs' lawyer stated the case in a nutshell. He admits that the city's program is a good one and that's why the city won't settle. Why should the city change its fire department because it's easier to hire Mr. Downs and give him the job that he wants than it is to preserve his rights? Even if this weren't a $500,000 case, this case will establish a principle. It will establish the power or the absence of power in federal agencies to define what a firefighter is. It will establish whether a broad crosscutting requirement for all federal grants applying to the handicapped is the same as a requirement for affirmative action in employment of the handicapped, and it will establish a legal principle for all of these crosscutting requirements on whether Congress has to pay any attention to what it's doing to states and cities. That's certainly our legal position. That's why the Mayor's here as well.

HEW: Let me just reflect quickly. The city's counsel is advocating the use of the *National League of Cities* case in this context. The government strongly opposes this. *National League of Cities* is a funny case. Let's face it. I've been reading in the papers this week about the "brethren" on the Supreme Court and how this case was really decided. To the extent the outcome was based on the law, the case is limited, we believe, strictly to the Commerce Clause area. And it's susceptible to being overturned even in that area. The Court expressly reserved the question whether the spending power or the Fourteenth Amendment would allow the federal government the ability to intrude in the state and local government affairs. We feel until a court has ruled on this, that through the spending power, the federal government may, indeed, set down standards by which state and local agencies must abide.

Further, spending is not the only Constitutional basis by which grant money is given to state and local governments. It's also considered to be the disposal of public funds under Article 4 of the Constitution.

Another point I wanted to raise as well is whether this court is even competent, in all humility again, Your Honor, to deal with this type of question. It is essentially a political question. It's one which is for the Congress to determine. There have been academicians writing on this particular point now who maintain that federalism issues such as those raised in *National League of Cities* are nonjustifiable. We submit that if the court does take on this case, that you do not expand the holding of *National League of Cities* into the spending clause or disposal of public fund area.

MAYOR: Your Honor, since the matter of politics has been raised, I feel I should inject a comment. I am a Mayor, duly elected by the citizens of Riverside and am responsible for the operation of the fire department. Mr. Downs is not elected. Mr. Downs is not responsible for the operation of the fire department. HEW is an agency which does not have direct responsibility to the public for the operation of the fire department.

As a politician I can see no basis, particularly in light of the extensive efforts we have made in behalf of the handicapped, for our city to change its course of action. We would welcome Mr. Downs into city employment in a capacity that we feel would make the most advantage of his talents, but certainly not to cause any possible risk to Mr. Downs or to the public.

JUDGE: All right, gentlemen, I suppose we've gone about as far as we can go in this context. It's clear that we're not going to settle this case here at chambers. I'll instruct the clerk to set the case down for hearing. As you probably know, we've been able to reduce our backlog somewhat and anticipate that we ought to be able to get to this case within 12 to 18 months.

Part VI

Reflections on the Theme: Is There a Law of Federal Grants and Where Is It Leading Us?

by Henry Monaghan
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The question considered today was, is there a federal grant law? And I think it's perfectly apparent that, at least to a lawyer, that's not a single question. It is, as the conference shows, really a series of different questions. They implicate the subject of Constitutional law and administrative law, and they involve matters of governmental practice.

What is interesting is what was common to all the speakers this morning. That is their acceptance of the desirability of federal grants. The dispute this morning, to the extent that there was a dispute, reduced itself to the questions of how the programs ought to be administered, not whether or not there ought to be any federal grant programs.

Perhaps I could add something by considering the desirability of the federal grant system. The practice is too far ingrained in the system to be overturned. I understand that perfectly. But it is useful to consider the impact on the federal structure of our government, and I suggest to you that it is profound in both theory and practice. Indeed, I think it's useful to put the question in a slightly larger context and to raise some questions about the present structure of our federal government.

In that respect it turns out that I'm scheduled to deliver a paper on the subject of the "Burger Court and Our Federalism" in about three weeks at the Annual Association of American Law School

Teachers. And I think that the first six pages of that paper have some special pertinence here and I'd like to use that as the text.

Some deride "federal" government as a weak government. Others find genius lurking in its institutional arrangements. But most people have considerable difficulty in identifying what a federal government is, whether the concept be approached analytically, legally, descriptively, or normatively. Happily, I don't need to pursue those matters too far. For like Mr. Justice Black, I'm only concerned with, to use his wonderful phase, "Our Federalism," which has become a staple in discussing Constitutional law. We're concerned, therefore, with Our Federalism, and like Mr. Justice Stewart and the subject of obscenity, we know it when we see it.

Constitutional lawyers are concerned with one special component of our Our Federalism, namely its legal context. Historically, the major issue has been substantive in nature, the extent to which the basic charge of the Constitution provides or mandates a clear division of power that both protects and confines—and I'd like to emphasize in this group the word "confines,"—the central and state governments in their respective spheres. That question has dominated Constitutional law for two centuries.

But that question is now devoid of any significance. The radical transformation that has occurred in the structure of our federalism in nearly two centuries of existence has emptied all the legal content from the concept of federalism and replaced it with a frank recognition of the legal hegemony of the national government. By that I mean the national government can do virtually anything it wants to the states.

All this occurred well before the arrival of the Burger Court, and that court shows no signs of attempting to undo the past. Now in recent years, attention has been drawn by academic theorists to a second process-oriented dimension of Our Federalism. We have come to accept as an article of faith that adequate federal and administrative mechanisms should exist to enforce federally secured rights. The Burger Court has been the object of much criticism at this level, some of it of a highly inflamed character. I think that those criticisms have been vastly overstated and that the Burger Court had done little to impair the Warren Court's legacy of strong federal enforcement of federal rights.

Here, I'd like to address myself to the substantive dimensions of federalism. Substantively viewed, Our Federalism is the central device by which our vast ocean-spanning nation has hoped to reconcile its needs for unity with its needs for diversity. The other reconciling device, the political party structure, is in a state of tremendous decline.

Pared to its essentials, the legal controversy focuses on the respective authority of the nation and the states to determine public policy. Who's going to set the public policy on any given issue? That controversy has gone through several stages historically. In each case, the emerging national consensus has become triumphant against any claims of state autonomy. The early decisions of the Marshall Court and the Civil War Amendments, the Thirteenth, Fourteenth, and Fifteenth Amendments, represented important stages in that process. While they vindicated nationally formulated norms against claims of state—or to be more precise, sectional—autonomy, they were not understood at the time to establish the complete national hegemony of the national government. That development came during, or more precisely at the end of, a period of national growth and industrialization. Regulatory efforts of this era, the New Deal, for example, brought with them questions related to the authority of the national government to regulate a complex, highly integrated economy dominated by nationally active corporate giants.

These efforts also brought questions of national competence to provide a minimum economic security for American citizens. As a matter of Constitutional theory, the battle was over by 1941. Once again, national authority was vindicated, this time through judicial acceptance of broad interpretations of Congress' power to regulate commerce and Congress' power to spend. Those important Supreme Court cases are far too well known to most lawyers to justify any rehearsal.

But it is useful to recall the extent to which they in fact confirmed a major reshaping of the original federal system. Of course, if Chief Justice Marshall was right in asserting that the power given to Congress to regulate commerce among the several states was intended to reach "those internal concerns of the states which affect the states generally," national legislative competence would expand as the economy assumed in the 19th Century a national, industrial, highly interdependent state.

Even so, the present centralization of economic control in the national government would have as-

> **“The radical transformation that has occurred in the structure of Our Federalism in nearly two centuries of existence has emptied all the legal content from the concept of federalism and replaced it with a frank recognition of the legal hegemony of the national government.”**

tonished the framers, in practical terms, if not in terms of Constitutional theory.

But the real transformation in Our Federalism has been worked by the model federal role in taxation, borrowing, and spending. Here the change seems to be one of theory. The single most important event in 20th Century Constitutional law is enactment of the federal income tax which resulted in the enormous accumulation of federal dollars and secondly dried up state taxation powers.

This massive accumulation is something the framers would never have thought about. In any event, the framers surely never imagined the subject of this conference. They surely never would have imagined the recent, but now deeply ingrained, practice of massive transfers of federal dollars to state and local governments. I'm speaking not simply of the restrictions attached to transfers but the actual transfers themselves.

I think Professor Hamilton is correct in asserting the framers envisioned, “a clear separation between state and federal governments, with each provided with sources of public revenues necessary for support of the functions assigned to it.” That certainly represents the assumptions of 1789, and as a matter of course, this model was carried into the local level. It was the layer cake theory. Each level of government was assumed to have its own duties and responsibilities and to be able to finance those.

You'll notice the last part of the notion that each unit of government had functions assigned to it. A line between those functions assigned to the state and those functions assigned to federal government cannot be maintained by courts without overt resort to a doctrine called dual federalism. Once the Supreme Court recognized that Congressional power to spend for the general welfare extends beyond the Article I, Section 8 checklist, 20th Century Congresses inevitably asserted a right to finance functions that the states had traditionally or exclusively financed. A judicial line was declared by the Supreme Court between spending for matters of national, as distinguished from matters of local, welfare. This results not in a dichotomy between national and local subjects but a trichotomy, an area of considerable overlap, where both the state and the federal government can spend.

The slogan of dual federalism necessarily yields to another slogan that was trotted out this morning, namely, cooperative federalism. This at any rate is the premise of the 1937 decision of the Supreme Court upholding the *Social Security Act*, and, in essence, reorganizing federal power to spend unlimited except by a specific Constitutional prohibition such as the First Amendment. Federal money with or without conditions attached may be transferred not only to the states but to their subordinate units of government. No purpose is excluded. Federal resources can be utilized for the specific purpose of improving the quality of local police departments. They can be used for the more general purpose of saving financially hardpressed cities. Ultimately, federal resources may be available to save hardpressed corporations. As a Constitutional lawyer, if these results under the Commerce Clause and spending powers seem inevitable as a matter of the judicial structure of the Constitution, the end result is still a profound alteration of the original Constitutional framework. The power of the national government to bring about compliance with nationally defined policies, through regulation and conditional spending, is for all practical purposes unlimited. The legal hegemony of the national government is therefore firmly established. Our Federalism is in short a political rather than a legal, doctrine.

Now all this was established before the arrival of the Burger Court. That Court entered midway in the current stage of the development toward centralized power. Namely, the extent to which the national government could guarantee political and civil rights to its citizens on a national basis. It does that in two ways: by providing for more effective enforcement of Constitutional norms such as racial equality and freedom of speech, and by imposing upon states and upon private parties norms beyond those specified in the Constitution.

Here too it's fair to say that the Burger Court has confirmed, and on occasion expanded, the views of its predecessor. Its decisions leave no material federalism-based doubts as to the Constitutional legitimacy of the ever-expanding federal statutory and administrative guarantees of civil rights and liberties.

The Burger Court has, in short, formulated no serious threat to the primacy of national legislative authority. The sole significant decision, the academically much beloved decision, *NLC v. Usery,* apart from being hopelessly in error, does suggest the existence of some structurally derived restriction upon national power to legislate in ways that impair integral state functions. But the important part about that case is that it has shown no generative power. Moreover, by its own terms, it is not a barrier to national control over the private sector. Nor is it a barrier to national control over the states themselves through conditioned spending. Nor is it a barrier to national control over the states themselves if the federal legislation is based on the Civil War Amendments. And most of what Congress does currently, or wants to do to the states currently, can be tied to the Civil War Amendments.

On the whole, therefore, the Burger Court has not significantly altered the conventional wisdom that the Constitution admits the states to the national political process for the protection of their interests. If the states lose there, that's the end of the game. It's hard for me to see any justification for the Court to intervene and know the political content of decisions reached by Congress on some supposed invisible radiation out of the Tenth Amendment.

To put it in a nutshell again, federalism is a political and not a legal doctrine in this country and the principal custodian of the federal government is Congress, not the Supreme Court.

The bulk of the Burger Court's substantive innovation has been at the non-Constitutional level. The Supreme Court has shown an increasing reluctance to displace state law by expansive construction of federal statutes or through the development of what we call federal common law. The refusal of the Court to expand judge-made law at the expense of state autonomy is an important development. Still I know of no empirical basis for complaint that these divisions either singly or in a combination have worked a major revision of the previously existing federal-state pattern.

Federal Judges and Federal Grants: A Dimension of Today's Dysfunctional Federalism

By David B. Walker
Assistant Director, ACIR

The federal judiciary, now, no less than in the days of John Marshall, is a major institutional conditioner of our American federal system and the intergovernmental relations which are so much a part of it. The notion that federalism is a static, Constitutional precept, which is chiefly the concern of judges and Constitutional lawyers is, of course, fallacious. And, so is the companion idea that federalism has little relationship to the dynamic fiscal, programmatic, and administrative linkages which are the sinews of intergovernmental relations. Our Constitutional history and especially a series of recent cases clearly indicate that the two are inextricably linked and a mutual conditioner of one another.

American intergovernmental relations, after all, have existed since 1776, and the Court has helped shape their character since 1789. Whether the Marshall, Taney, post-Civil War, Fuller, Taft, Hughes, Stone, Vinson, Warren, or Burger Courts are probed and analyzed, an implicit or explicit theory of federalism was enunciated and intergovernmental relations were affected accordingly. This is not to say that politics, the political branches of the national government, and historic events (such as wars and depressions) have not had their impact. Clearly, they did. The point, however, is that the Supreme Court has served throughout as the ultimate sanctioner or, in some instances, the initial interpretor, of the intergovernmental relations of each phase in the evolution of American federalism.

During its first 146 years, the Court generally adhered to a dual federalist theory. Neither the Marshall decisions relating to the commerce power or to the sanctity of contracts nor those in the first two decades of this century relating to taxation for regulatory purposes and to the commerce power in any way significantly modify this generalization. Thus, court cases and actual governmental practice (through 1933) suggested a basic division of functional responsibilities between the states and the nation, a contesting relationship between the two levels, and only incidental "sharing" and "collaboration" and this was as Madison intended.

With the dramatic shift in 1937 in court attitudes and ultimately in composition, federalism became a dead or largely irrelevant Constitutional principle for some scholars. After all, they point out, it was in the late 1930s that the term "intergovernmental relations" was born. Yet, this misses the Constitutional point, since all federal systems, no matter what their stage of evolution, exhibit some type of linkages and connections between and among their governmental levels. The fact that such relations were minimal, not major, and more controversial than cooperative during the pre-1937 period does not mean that they did not exist. They obviously did.

Intergovernmental relations emerged in the 1930s as a concept, distinct from that of federalism, because interlevel relationships changed drastically during the Great Depression. The number of grant programs soared as did their dollar amount. By 1939, total aid outlays were 15 times the 1933 figure. The old dual federal theory was gradually being eroded, and a new concept of federalism and of intergovernmental relations was beginning to emerge. Moreover, while this process began in the political branches of the national government, it ultimately required the approval of the Supreme Court; and the way in which the latter sanctioned these developments has been a critical conditioner of intergovermental relations ever since.

THE "OLD COURT" AND ITS NOT ALWAYS "CONSERVATIVE" DECISIONS

Prior to 1937, the old Court had handed down three basic decisions regarding federal grants. In a pair of Massachusetts cases in the early 1920s, two principles were established:

☐ Congress' spending power, as utilized to finance grants-in-aid, does not "require the states to do or yield anything," since states may defeat any alleged "ulterior purpose" by "the simple expedient of not yielding" and of withholding "their consent."[1]

☐ An individual (in this case a Massachuetts resident) has no right to question the specific purposes for which his federal taxes are used, "since after funds have been brought into the Treasury and mingled with other funds, Congress has sweeping power to dispose of these funds."[2]

In the controversial *Butler* case, an equally conservative Court voided the *Agricultural Adjustment Act of 1933* in a somewhat convoluted opinion which held that its processing tax was not really a tax, but a means of regulating agricultural production and that, while Congress had broad power to appropriate for the general welfare, the crop benefits authorized by the act were in fact a system of agricultural regulations, not a matter of voluntary compliance or rejection, hence clearly a violation of the Tenth Amendment.[3]

The positions enunciated in these cases, along with their ambiguities, are still very much with us, though the question of constraint on Congress' spending power admittedly is more a theoretic than a practical option now.

THE "NEW DEAL COURT" AND ITS LEGACY

The first evidence of a change in Court opinion regarding the spending power came in late 1937 with the *Steward Machine Co. v. Davis* decision. In sanctioning the *Social Security Act,* the unemployment excise tax on employers was upheld as a legitimate use of the tax power and the grants to the states were viewed as examples of federal-state collaboration, not of federal coercion. Hence, they were fully within Congress' power to appropriate for "the promotion of the general welfare" and constituted no infringement on the states' "reserved powers."[4]

From 1937 until the mid-1960s, relatively few cases arose regarding federal aid. Those that did focused chiefly on whether certain conditions attached to specific grants (*Hatch Act* prohibitions and equal treatment of recipients under a grant's regulations) violated the Tenth Amendment.[5] This absence of justiciable grant controversies, however, only reflected the times. The growth in grants both in dollar terms and numbers, after all, was glacial during the period 1945-63. Moreover, the conditions attached to them were relatively unintrusive and clearly related to program purposes, compared to those of today.

If one were to have summarized the state of grant case law just prior to the advent of the current era (1963), the following principles would have to be cited:

- Congress' power to spend for the general welfare via grant programs is not restricted to the enumerated powers detailed in Article I, Section 9 of the Constitution.
- Conditions attached to grants are a legitimate exercise of Congress' power to fix the terms by which federal funds are expended.
- The grant device is essentially a cooperative venture entered into freely by the subnational partners, with the latter's right to refuse to participate constituting the chief means of protecting the powers reserved to the states under the Tenth Amendment.

Implicit in these principles were potential dangers to the long-term viability of federalism as a Constitutional principle. For example:

- Is a grant really a collaborative venture, freely entered into by recipient partners?
- Can the Court-sanctioned latitudinal power of Congress to spend for whatever grant programs it deems as promoting the general welfare be adequately curbed politically?
- Does the Court have an obligation to abandon its passivity in this area, if the conditions attached to grants bear no reasonable relationship to the attainment of their program objective?

Yet, none of these questions appeared pivotal or even problematic in the early 1960s. And, no wonder! The grant system then was a relatively modest affair, involving only $10 billion in 1964, with about 150 separate grants—though with three-quarters of the funds channeled into only four federal-state programs (highways, aid to the aged, AFDC, and employment security), and conditions that related almost wholly to specific program goals or to their fiscal management. Despite the nearly 80 years in its making and baking, the "marble cake" of American federalism, as of 1963, was a small one with basically two ingredients (federal and state), and with only a few major vertical swirls in its relatively uncomplicated pattern. The most fundamental changes wrought by the New Deal, war, and post-war economic and social developments, after all, were in the federal government's direct regulatory, promotional, and subsidy roles, as well as in civil liberties and civil rights, not in grants-in-aid. Hence, the heavy focus in Constitutional terms was on the commerce power, the taxing authority as a regulatory device, and the Fourteenth and First Amendments in those years, and not on the spending power as it relates to aid programs.

THE EMERGENCE OF A NEW SYSTEM

The real body of grant-related case law, then, is a product largely of the past decade and a half. As such, it merely mirrors the extraordinary changes that occurred in the federal role and in the federal system—politically, programatically, administratively, fiscally, and, above all, attitudinally—during this relatively brief span of time. The nature, scope, and purposes of the federal grant system have been transformed in the process and in ways that have produced an increasingly dysfunctional federalism. Witness:

- the nearly 900% hike in federal aid flows between 1963 and 1979 (and a 322% hike in constant dollar terms);
- the ever-mounting number of aid programs, with 240 new ones added during the Creative Federalism years of Johnson and another 120 or so during the New Federalism era of Nixon-Ford, to the point now where 500 separately authorized and funded programs are operational;
- the extension of direct eligibility to practically all local governments, as well as to the 50 states and a range of nonprofit bodies, producing a 30% "bypassing" of state governments last year, compared to a 15% figure in 1968;
- the growing reliance on allocating grant funds by formula (up to 75% of the total,

compared to 66% in the mid-1960s), with a new form of grantsmanship (and of conflict among the public interest groups) emerging that focuses not on administrators as much as on Congress and the need to fashion favorably the formulas (and eligibility provisions);

- the spread of federal aid to all of the big efforts of intergovernmental and national import (like welfare, health insurance, environmental programs, transportation, and education) as well as to a profusion of activities that not so long ago were deemed wholly state-local responsibilities (like rural fire protection, libraries, jelly fish control, police, historical preservation, urban gardening, training for use of the metric system, arson, home insulation, meals-on-wheels, snow removal, aquaculture, displaced homemakers, education of gifted children, development of bikeways, aid to museums, pothole repair, runaway youth, school security, and art education);
- the change in the forms of federal assistance, at least outwardly, with all the traditional types of categorical grants (project, project/formula, formula, and open ended) still in use, along with at least five block grants and General Revenue Sharing;
- the extension of conditions to all forms of federal aid, with procedural strings (civil rights, citizen participation, and auditing requirements) added to GRS in 1976 and more and more substantive strings added to block grants as they evolve over time, thus rendering inaccurate the older description of these two forms of aid as essentially "no strings" and "few strings" assistance programs, respectively;
- the emergence of a new era of, and a new-style approach to, federal regulation, with the piecemeal enactment of a range of across-the-board requirements in the environmental, equal access, equal rights, relocation, historic preservation, and personnel areas, to cite only the more obvious, thus underscoring the fact that the conditions now attached to practically all federal assistance are infinitely more complex, more controversial (with more judicial decisionmaking), more pervasive (in terms of the number of jurisdictions affected), and more penetrating (in terms of the focus of some on the internal operations of whole governmental jurisdictions) than their largely program-oriented predecessors of the mid-1960s;
- the growing reliance of certain states and especially larger and poorer local jursidictions on federal aid, with direct aid for cities 500,000 and over soaring from 28% of their own-source revenues in 1976 to over 50% in 1978, which suggests a degree of fiscal dependence unimaginable even a decade ago; and
- finally, the fundamental questions relating to administrative effectiveness, economic efficiency, and especially accountability, which have been raised by the public and by Presidents as the programs, payrolls, and revenues of subnational governments have become ever more intergovernmentalized.

These ten trends underscore the quasi-revolutionary changes in recent American intergovernmental relations. They suggest a collapse in the political and fiscal constraints that formerly operated to sustain federalism. And, they combine to convey the impression that all significant policymaking is done in Washington, but they cannot conceal the fact that little of any servicing significance is implemented there. Against this backdrop of seemingly mindless and uncontrollable tendency to intergovernmentalize everything, where and for what has the Court stood?

THE COURT(s) AND CONTEMPORARY INTERGOVERNMENTAL RELATIONS

In large measure, the Supreme Court has adhered to its earlier concepts relating to Congress' power to spend for any program it deems necessary for promoting the general welfare, to Congress' concomitant right to attach conditions to such programs, and to the grant-in-aid as collaborative and voluntary, not a coercive or unrefusable, mechanism for achieving Congress' promotional goals. Unlike the Court's assertive stance in nearly every other area of its Constitutional concerns (save for the commerce power), in this one area, its posture ostensibly has been one of restraint and of deference to Congress. Yet, the practical effect has been to help further changes in the grants' realm, as drastic and as qualitatively different as those the Court itself has initiated in such areas as civil rights, criminal procedures, libel, and reapportionment.

To put it differently, the current Court's atypical reliance on precedent and past principles have not helped to stabilize intergovernmental relations nor really to reconcile the old with the new. Instead, it has simply ratified, with a few exceptions, the novel course that was launched politically in the mid-1960s and has continued unabatedly in the 1970s, with little to no attention to the secondary, tertiary, or certainly the long-term systemic effects of their decisions.

Before getting more judgmental, the manner in which the federal judiciary recently has applied its traditional grant-related precepts should be probed. First, regarding Congress' power to spend to promote the general welfare, a few constraints have been imposed. Yet, these have related to violations of the First, Fifth, and Fourteenth Amendments,[6] not to the Tenth. Moreover, deciding what programs promote the general welfare still is held to be a distinctly Congressional function.

Second, the authority of Congress to attach all sorts of conditions to federal aid programs also has been upheld in several cases, even though many of these conditions are of a type and have an effect that contrasts markedly with their predecessors of the 1950s or the 1940s. Thus, a requirement that would necessitate a state to amend its Constitution (i.e., to authorize its police power to regulate certain private institutions) was upheld by a district court as no violation of the Tenth Amendment.[7] Similarly, a requirement that had the practical effect of leaving basic public health decisions in the hands of a county planning unit and beyond the authority of the county executive and board of commissioners was sanctioned as merely part of a "cooperative venture among the federal and state and local authorities."[8] In another case, a grant requirement stipulating a specific (and, many would say arbitrary) pattern of headquarters-field relationships within a state's bureaucracy, which contravened a duly enacted and highly commended state reorganization and which overlooked a provision of the *Intergovernmental Cooperation Act of 1968*, was found valid. The Court contended that it was not "coercive" or "mandatory" and that the state had the right to refuse to participate in the program.[9]

Third, the grant device clearly is still defined in nearly the same basic terms as it was in the early 1920s: as a quasi-contractual relationship, hence freely entered into but with differing obligations for the grantor and the grantee. Moreover, the Court has maintained this interpretation even in instances where all aid funds in a functional area would be cut off if a recipient failed to meet all the requirements in one of them *(National Health Planning Act)* and where the grant program involved probably had more regulations and requirements attached to it than any other (AFDC).[10]

Fourth, the Court has moved forward and fleshed out the obligations and rights that a grant places on the grantor, grantee, and, in the case of transfer payments grants, on the ultimate recipients. Thus, several procedural due process rights of grant applicants and recipients have been upheld, clarified or established by the Court.[11] Moreover, agency regulations concerning eligibility in and rights established by certain grants have been scrutinized in light of their statutory bases, their mode of development and promulgation, and the extent to which they aid the intended beneficiaries.[12] In these efforts, the Court has exhibited some of its more habitual assertiveness, though almost always in the context of presumably interpreting a grant statute. Finally, the Court has sanctioned the application of several of the 60-odd national social and environmental standards (under a like number of statutes enacted between 1964 and 1979) to grant recipients and, in the process, the rights of third parties have been strengthened.[13]

CONCLUSION

To sum up, thanks to the explosion in federal grants over the past decade and a half, along with the real ambiguities regarding grant requirements, responsibilities, and rights that have accompanied this development, the federal courts—especially the High Court—have assumed a major role in grants' management. Procedural and even certain substantive due process rights have been injected into the process, sometimes to the grantor's benefit; sometimes to the grantee's; sometimes to the ultimate recipient's; and sometimes to an affected third party.

The paramount thrust of the Court's decisions, however, has been to reaffirm the supremacy of

> **“(The system) needs a judicial approach and theory that reflects a genuine sense of balance.”**

Congress' power to spend in furtherance of the general welfare, to rarely curb its authority to attach almost any conditions to grants—whether reasonably or unreasonably related to the program's basic purpose, and to leave the protection of reserved powers almost wholly up to the states and their presumed capacity to refuse or to withdraw from participation.

A tenuous theory of cooperative federalism may be deduced from some of these recent decisions. Yet, it lacks content and seems only to suggest that the Court “feels” that grants are a collaborative, not coercive, way of enlisting recipient participation and that “considerable autonomy remains vested in grantees to deal with the shape, content, and administration of the aided programs despite mandated federal standards.”[14]

In leaving the prerogative of determining what best promotes the general welfare almost wholly to Congress and in refusing thus far to apply any test of what is really reasonable and really related to the conditions that are attached, the Court implicitly has endorsed Congress' currently semianarchic, but politically astute, approach to and prime control of contemporary intergovernmental relations. By assuming a passivity in this area, while aggressively asserting ever greater authority for itself in nearly all others, the federal judiciary may have avoided some confrontations with the political branches and with various powerful pressure groups; but it has won few friends in the process and a spectre of legal sophistry has been raised.

Of greater significance, of course, is the fate of the system that the Court has sworn to uphold. When one ponders the loose legislative and rampant interest group politics that dominated the enactment of most of the grants (notably, the *Vocational Rehabilitation Amendments of 1973* and the *National Health Planning Act of 1974*) whose arbitrary requirements have been upheld, the need for some form of judicial arbitration becomes apparent. It could well begin with cases involving conflicts between such conditions and provisions of other Congressional statutes. To leave the definition of the general welfare wholly to a process which, in this decade, successfully coopts practically all of the affected functional interest groups in each aided area during the course of renewals, is to suggest that the old and outdated textbook theory—the Madisonian theory, if you will—of the national law-making is the one to which the Justices still adhere. To focus so heavily on the responsibilities of granting agencies and of grantee governments, while ignoring the more fundamental responsibilities the Congress and the Court have under the Constitution to assure the continued vitality of the federal system is to dally with symptoms and not to deal with remedies. To accord a higher place in the order of things to a narrowly based social interest group operating under the cloak of an act of Congress—over and against the elected officials of a state demonstrably bent on improving its over all social services delivery system and with other Congressional statutory provisions supporting its case—reflects little concern for programmatic outcome and no sensitivity to reforms in the states.

In short, the system needs more than a confectionary judicial theory of cooperative federalism. It needs one that is rooted in the realities—political, fiscal, administrative, programmatic, and procedural—of today's intergovernmental relations. Above all, it needs a judicial approach and theory that reflects a genuine sense of balance.

Thus far, the judiciary has been an unwitting collaborator in shaping a federal system in the 1970s that is impossible managerially, costly in fiscal terms, questionable in its alledged concern for equity, and, above all, increasingly unaccountable in a political as well as a Constitutional sense.

If there is any real judicial devotion to what Mr. Justice Black referred to as “Our Federalism” not so long ago, then a new stance will have to be assumed; some old precedents will have to be dusted off; and some new ones will have to be established. The irrational judicial (and legal community) fear of the Tenth Amendment must be exorcised. It no longer is the refuge of racists, reactionaries, and rural areas (especially rural farm animals). The Supreme Court, after all, helped to end all that. Yet, it has difficulty recognizing the salutary effects in the states of some of its own earlier decisions. In short, and to rework an old explanation of judicial behavior: “A switch by nine, could save the system—in time.”

FOOTNOTES

[1] *Massachusetts v. Mellon*, 262 U.S. 456 (1923).

[2] *Frothingham v. Mellon*, 262 U.S. 447 (1923).

[3] *U.S. v. Butler*, 297 U.S. 1 (1936).

[4] 301 U.S. 548 (1937).

[5] Cf. *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947) and *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958).

[6] Cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Tilden v. Richardson*, 403 U.S. 672 (1971).

[7] *North Carolina v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977).

[8] *Montgomery County, Maryland v. Califano*, 449 F. Supp. 1230 (D. Md. 1978).

[9] *Florida Department of Health v. Califano*, 449 F. Supp. 274 (N.D. Fla. 1978) aff'd 585 F. 2d 150 (5th Cir. 1978).

[10] Cf. *North Carolina v. Califano, supra* and *King v. Smith*, 392 U.S. 309 (1968).

[11] Cf. *Richard B. Cappalli, Rights and Remedies Under Federal Grants*, Washington, DC, Bureau of National Affairs, Inc., 1979, pp. 180-243 and Thomas J. Madden, "The Rights to Receive Federal Grants and Assistance," *Federal Bar Journal*, Vol. 37, Fall 1978, pp. 27-29.

[12] Cf. Madden, *op. cit.*, pp. 29-35 and 50-52.

[13] Cf. *Ibid.*, pp. 49-50.

[14] Capalli, *op. cit.*, p. 12.

Conference on Federal Grant Law
December 12, 1979
Washington, DC

8:15-9 a.m.
REGISTRATION

9-9:10
Welcome and Opening Remarks
Wayne F. Anderson, Executive Director, ACIR

9:10-10:30
The Law of Federal Grants: Where Is It Headed?

*Tom Madden, General Counsel and Assistant Administrator, LEAA**

Respondents:
*Malcolm Mason, Chairman, Departmental Grants Appeals Board, HEW**
Robert Wallick, Steptoe and Johnson, Washington, DC

10:30-10:45
COFFEE BREAK

10:45-12:15
The Interaction of Federal Grants and The Law: Community Development and LEAA Litigation as Case Studies

Moderator:
Tom Moody, Mayor of Columbus, Ohio and Member of ACIR

Panelists:
George D. Brown, Professor, Boston College Law School
Charles Lauer, LEAA Deputy General Counsel

12:30-1:45
LUNCHEON

Charles S. Rhyne, Rhyne and Rhyne, Washington, DC

1:45-3:30
Anatomy of a Grant Controversy: Handicapped Regulations and City Hall

Moderator:
Carol S. Weissert
Information Officer, ACIR

Actors:
William Montalto, Assistant Project Director, Coordinating Committee on a Model Procurement Code, American Bar Association
William S. Rhyne, Rhyne and Rhyne
*Stephen Sorett, Office of General Counsel General Accounting Office**
*John Settle, Chairman, Board of Assistance Appeals, Environmental Protection Agency**
Carl W. Stenberg, Assistant Director, ACIR

3:30-3:45
BREAK

3:45-4:30
Reflections on the Theme: Is There A Law of Federal Grants and Where Is It Leading Us?

Henry Monaghan, Robert S. Stevens Professor of Law, Cornell Law School
David B. Walker, Assistant Director, ACIR

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*These titles are accurate as of December 1979.

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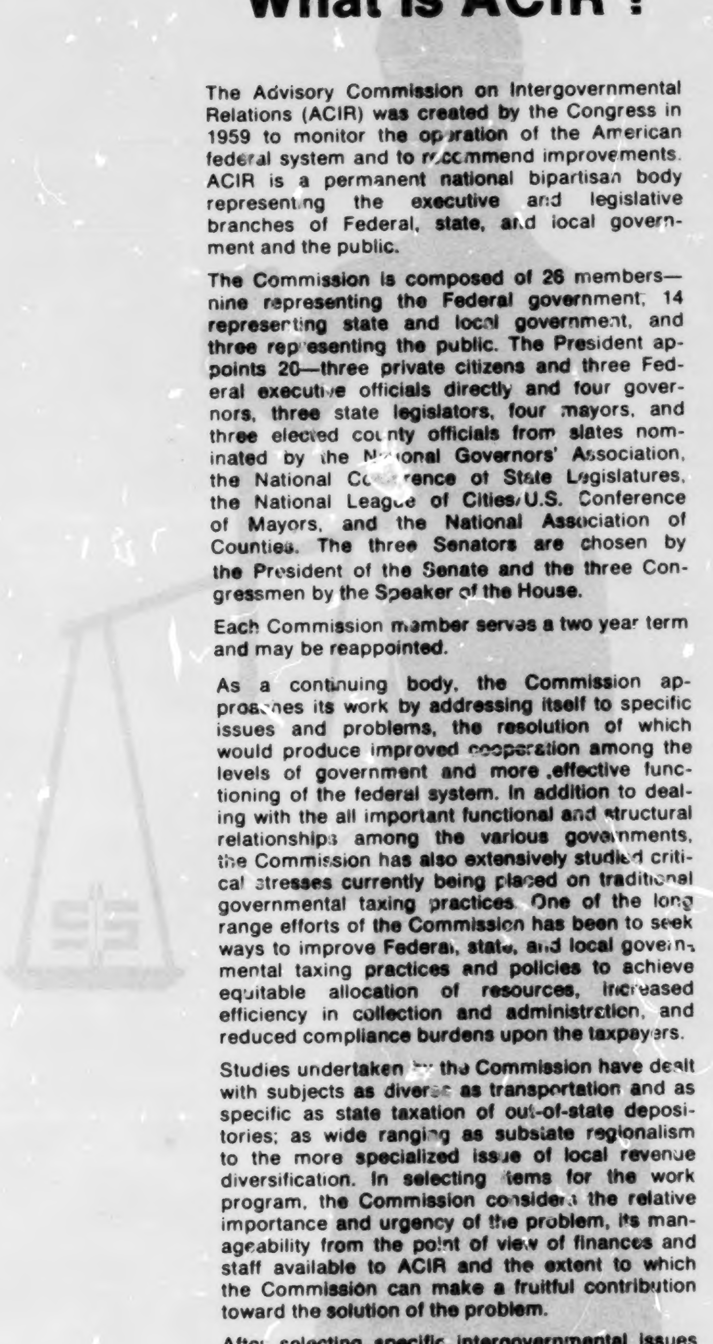

The Advisory Commission on Intergovernmental Relations (ACIR) was created by the Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. ACIR is a permanent national bipartisan body representing the executive and legislative branches of Federal, state, and local government and the public.

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